This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
State Office of Risk Management, Petitioner,
v.
Mary Lawton, Respondent.
No. 08-0363.

March 11, 2009.

Appearances:
Thomas M. Lipovski, Office of the Attorney General, Austin, TX, for petitioner.
Stuart F. Lewis, Law Office of Stuart F. Lewis, Bryan, TX, for respondent Mary C. Lawton.
Elaine Chaney, Office of Injured Employee Counsel, Austin, TX, as amicus curiae, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0363 State Office of Risk Management v. Mary Lawton.
MARSHALL: May it please the Court, Mr. Lipovski will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS M. LIPOVSKI ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS M. LIPOVSKI: May it please the Court, Section 409.021 in the Texas Labor Code gives insurance carriers up to 60 days to contest the compensability of an injury, after which the right to do so is generally waived. However, Commission Rule 124.3E provides that this statute is not applicable to disputes over extent of injury. In this case, the court below found that SORM's dispute constituted an extent of injury dispute. Nevertheless, it applied Section 409.021 60-day waiver provision and held that SORM's complaint was untimely and, therefore, waived. This decision must be reversed. It is not supported by 409.021 and it is in direct conflict with Rule 124.3E and the Commission's intent in adopting the rule.
JUSTICE DAVID M. MEDINA: Who makes that determination on the

extent of the injury versus the injury? If you have a contusion versus a degenerative disease in the knee, that doesn't seem to have anything to do with the extent. It seems either you have a contusion that's related to the other knee damage or they're two separate events. They seem to be two separate events.

ATTORNEY THOMAS M. LIPOVSKI: Well, Justice Medina, that's actually precisely what an extent of injury dispute is and if you look to the Texas Register, it explains what an extent of dispute injury is. I'm quoting from the Texas Registry here. It says that when you're challenging an extent of jury, you're not denied the compensability of a claim as a whole. What you're doing is you're, it's a challenge over the amount or type of medical benefits to which the employee's entitled, i.e., what body area, systems, injuries, conditions or symptoms for which the employee is entitled to treatment. It's not now the employee's entitlement to benefits in general. So what we're looking to here is there's been an injury. We all understand that there's been an injury. As a result of that injury, what medical treatments are going to follow? Here, the medical treatment that was requested was for a degenerative condition of the knee. That's different from the injury as a whole and that's why this is precisely what an extent of injury is to recover as the Court below correctly found. Now, the fact that this is an extent dispute has a dramatic effect on the time to dispute the issue and the consequences for failing to timely do so. As I mentioned, under 409.021 carriers have 60 days for notice to dispute the injury and to dispute the extent of the, or excuse me, to dispute the compensability and the failure to do so generally results in waiver. Rule 124.3 provides, "Texas Labor Code, Section 409.021 and subsection A of the section do not apply to disputes over extent of injury." This rule sets a different timeframe for disputing extent of injury. It's one that's tied to the deadline to pay the medical bill for the condition at issue.

JUSTICE SCOTT A. BRISTER: What is that deadline?

ATTORNEY THOMAS M. LIPOVSKI: The deadline is 45 days from the receipt of the medical bill. The rule's promulgated by an administrative agency acting within a statutory authority so it has the force and effect of legislation, but the Tenth Court failed to follow this rule. Despite acknowledging it is an extent of injury dispute, it applied the 60-day waiver provision and in doing so, it created the new exception to Rule 124.3E and held that SORM had to dispute extent of injury within 409.21 60-day waiver period because it was on notice that she sought benefits for something more than a contusion and was in a position to dispute extent of injury during that time.

JUSTICE DALE WAINWRIGHT: Some benefits paid during the initial period of time for the contusion to the knee?

ATTORNEY THOMAS M. LIPOVSKI: She received benefits, Your Honor, for the contusion, I believe temporary income benefits. So benefits were initiated.

JUSTICE DALE WAINWRIGHT: Okay and then at some point, the request for benefits seemed to be something different or more than a contusion is your position.

ATTORNEY THOMAS M. LIPOVSKI: Correct, at some point in time, they received notice that there was, they were seeking to do medical treatment for the degenerative changes to the knee. Now the exception created by this Court is unsupported by the text of 409.021 and as I mentioned, it's in direct conflict the rule and the Commission's intent on adopting the rule. I'd like to examine each. First, with respect to the Texas statute, as recognized by the Tenth Court of Appeals in a

prior decision, [inaudible] Insurance Company v. Pemberton, the statute pertains only to the overall injury and pertains to the carrier's initial response to the to notice that an employee has been injured. It doesn't discuss extent of injury disputes. Now let's examine Rule 124.3E. It's in direct conflict with this rule for two reasons. The first is obvious. It says Section 409.021 does not apply to extent of injury disputes, but there's a second reason. The principal of reasonable discovery is not applicable to extent disputes. Rule 124.3A imposes an obligation on carriers to conduct an investigation, hence the compensability of an injury, the carrier's liability for the injury and the accrual of benefits. Rule 124.3E expressly provides that this obligation to investigate does not apply to extent of injury disputes. For this additional reason, the decision of the court below conflicts with Rule 124.3E. It effectively imposes an obligation on carriers to investigate extent of injury disputes even though the rule says no such obligation exists.

JUSTICE NATHAN L. HECHT: What if the notice of injury had said something like contusion and possible severe chondromalacia. Then where would the carrier be?

ATTORNEY THOMAS M. LIPOVSKI: I'm sorry, the last part of that question?

JUSTICE NATHAN L. HECHT: Then where would the carrier be?

ATTORNEY THOMAS M. LIPOVSKI: Notice of the injury really does not have anything to do with the extent of injury dispute. What the notice of injury, I'm sorry.

JUSTICE NATHAN L. HECHT: Doesn't it tell you what the injury, what the asserted injury is?

ATTORNEY THOMAS M. LIPOVSKI: It gives you notice that there has been an injury, but it does not necessarily mean that that is actually going to be the injury that's compensable. For example, it could be something that was reported to the employer and the employer reports it to the carrier, but there's been no doctor involved yet in that process. So it doesn't really do a good job of defining what the compensable injury is.

JUSTICE PHIL JOHNSON: What if she fell and contused her knee and started getting treatment for that and six or seven months later, her back started giving her problems and she goes to a back doctor who says well, no prior problem. Looks to me like when she fell what she did is damaged the disc and so now that emanates from the injury. Is that extent of injury or is that or do we, what is the position on that?

ATTORNEY THOMAS M. LIPOVSKI: That would be another example of extent of injury and that's set out in the preamble, which actually discusses that type of situation where.

JUSTICE PHIL JOHNSON: Well in that case, you really or no one knew about the back injury, but they knew about the incident. Your position is once you have the incident, then you're liable for everything that emanates from that, but you can't discover it all up front. Is that your position basically?

ATTORNEY THOMAS M. LIPOVSKI: Yes, well the position is that the extent of the compensable injury is going to be defined over time as the medical bills come in and that's actually what Rule 124.3 contemplates when it's tying it to the deadline to pay or deny the medical bill. In fact, we looked at Texas Register, which reflects the intent of the Commission. It points out that, it reflects that the commission considered a proposal to standardize the rule with one timeframe to cover all denials.

JUSTICE DAVID M. MEDINA: Let me just backtrack there for a second.

ATTORNEY THOMAS M. LIPOVSKI: Yes, Justice Medina.

JUSTICE DAVID M. MEDINA: I'm a little confused. You said this is determined when the bills come and that they are to be paid.

ATTORNEY THOMAS M. LIPOVSKI: Extent, yes, Your Honor, extent of injury disputes arise when the bills come into the carrier.

JUSTICE DAVID M. MEDINA: There's never a doctor's report that's reviewed prior to the bills being received to study whether or not it's a compensable injury.

ATTORNEY THOMAS M. LIPOVSKI: That does not have any role, Your Honor, in defining the extent of the compensable injury. It comes from the medical bills.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is your position consistent with a position that the Commission has taken on this?

ATTORNEY THOMAS M. LIPOVSKI: Yes it is, Justice Jefferson.

CHIEF JUSTICE WALLACE B. JEFFERSON: Your opposing Counsel says it's contrary to.

ATTORNEY THOMAS M. LIPOVSKI: Well I think that what you have to look to is what is the Commission. What do we look to determine what is the Commission's intent in this circumstance? There are Commission Appeals Panel decisions which hold otherwise. The Commission Appeals Panel decisions are to the effect that the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period. But these Appeals Panel decisions, while they're normally entitled to deference, they are not entitled to deference if they are plainly erroneous and inconsistent with the Texas rule. That's what this Court held in Rodriguez v. Service Lloyds Insurance Company and that case has applicability here. In Rodriguez, the Court reviewed the interpretation of a Commission rule that "the first impairment rating assigned to an employee is considered binding if it is not disputed within 90 days of assignment." The plaintiff in that case argued that she was entitled to exceptions to this rule, including substantial change of condition and, indeed, a Commission Appeals Panel decision had held that there were exceptions to the rule, including one for substantial change of condition. When this Court got that decision, it looked at the text of the rule. It found no exception.

JUSTICE NATHAN L. HECHT: The problem I'm having though is it seems like compensability and extent of injury are sort of on a continuum and, of course, this rule's fairly plain, says doesn't apply to extent of injury, but it just begs the question of where in the continuum does the line fall. It seems like a carrier could take the position well reported an injury at work, say the back injury, but we take the position that sure, the worker may have twisted a muscle or something, a fairly insignificant injury, but not anything like this major surgery that was required to fix the spine and you could move that continuum back and forth. So how does that, how do you, how do we resolve that?

ATTORNEY THOMAS M. LIPOVSKI: Well, Justice Hecht, the difference between compensability of an injury and extent of injury is the difference between denial of an entire claim and denying or looking at pieces of the claim as they come and deciding whether or not those particular pieces are entitled to benefits, that those particular pieces are compensable and that's reflected really in the Texas Register, which states, "the timeframes for denial of the claim" when it's dealing with compensability 409.021, the timeframes for denial of a claim in its entirety are statutorily driven by Texas Labor Code Section 409.021. So, again, it talks about compensability being a denial of an entire claim.

JUSTICE NATHAN L. HECHT: Well I understand that, but I guess what I'm saying is, I suppose no carrier would object to admitting that $10 was compensable. They would just object to admitting that any of the rest of it was compensable and want to reserve the right to challenge that, but surely there are lots of cases where there was what looked like a relatively minor injury at work, twisted back or something, and then it turns out to be much more severe than that. So how do you draw the line between that appearance and what later looks like extent of injury?

ATTORNEY THOMAS M. LIPOVSKI: Because the extent of injury is going to arise when you get that medical bill. So as soon as you get that, that's when you start the dispute process. That's when you start the evaluation process and if there is a dispute, that's when it goes through the normal procedures.

JUSTICE NATHAN L. HECHT: Then what do you have to do in the first 60 days?

ATTORNEY THOMAS M. LIPOVSKI: Within the first 60 days, you have to make a decision as to whether or not there has been an injury that is work related, number one, compensability of an injury. You also have to make a decision whether there's any exceptions to liability that are applicable within the first 60 days. Was the employee intoxicated? Was there horseplay? Personal animosity? These type of exceptions. Those are what you have to look at as to the overall injury. Then as time goes on, we start to narrow, we start to look at and define the scope, the extent of the injury and what is compensable as a result of the overall injury.

JUSTICE NATHAN L. HECHT: But a degenerative disease wouldn't be compensable because it didn't happen at work.

ATTORNEY THOMAS M. LIPOVSKI: One would assume unless it was perhaps carpal tunnel syndrome or something like that. I don't know if that would be a degenerative disease.

JUSTICE NATHAN L. HECHT: And yet you're arguing here that that's extent? So it seems to me to be both compensability and extent of injury.

ATTORNEY THOMAS M. LIPOVSKI: Well what we're looking at is to what was the extent of the compensable injury, the overall injury, what did it include. She's not making a separate claim that on a separate day there's a separate injury. This is for a treatment for a condition. We're looking at is she entitled to treatment for this degenerative knee condition because the degenerative knee condition is related to the bump on the knee, the initial injury, which was the bruise and what we're saying is no. There is no relationship between the two. That's the essence of an extent of injury dispute.

JUSTICE NATHAN L. HECHT: I guess, here's what I'm struggling with. If it happened at home instead of at work, you'd have to deny that in 60 days.

ATTORNEY THOMAS M. LIPOVSKI: If that was the only injury that was being claimed.

JUSTICE NATHAN L. HECHT: But if both of them happen at work, both or that's the allegation, the contusion and the degenerative disease, you don't have to make, you don't have to challenge compensability of the latter and I'm struggling with how you know the difference.

ATTORNEY THOMAS M. LIPOVSKI: The difference is when you're looking at compensability, the difference is, in essence, was there an injury on the job and, at that point in time, we're trying to define the extent and the scope of injury after that, but that doesn't have anything to do with the 60 days. It's an initial up or down as to

whether there was an injury on the job. Then we examine what that injury would include so what we have to focus on is here, the initial report of the injury was a contusion. Then later, we get a report that there's a degenerative knee condition.

JUSTICE SCOTT A. BRISTER: If the initial report had been contusion and degenerative conditions, then you would have to object within 60 days?

ATTORNEY THOMAS M. LIPOVSKI: Justice Brister, that would actually not make any difference. We would have to object within 60 days if we're going to deny the entire claim and say neither the bruise or the degenerative knee condition or whatever it may be occurred, but if we get too, if we get a report that indicates that there's a number of problems with this individual as a result of an incident at work, defining actually what is compensable is the process of extent of injury. That's where you have the extent of injury disputes. We're trying to give [inaudible]. We're trying to get the extent of the injury through the receipt of medical bills.

CHIEF JUSTICE WALLACE B. JEFFERSON: It's difficult to write an opinion that would cover abuses of the system, but isn't, do you concede that there is at least a possibility that an employer could, in effect, deny a claim, pay the $10 that Justice Hecht mentioned, but, in effect, deny a claim well beyond the 60 days that the 409 section permits by saying this is an issue of extent and not compensability?

ATTORNEY THOMAS M. LIPOVSKI: Well, Justice Jefferson, and first of all.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what are the limits on that? How could that sort of abuse be reigned in ever?

ATTORNEY THOMAS M. LIPOVSKI: Just to clarify first, it would be a carrier, not the employer that would do that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Carrier.

ATTORNEY THOMAS M. LIPOVSKI: And in such circumstances, the carrier does not have a motive to go ahead and just frivolously deny extent of injury disputes. If they have an extent of injury dispute and they're wrong, they're going to have to pay interest on whatever benefits were supposed to be paid. They also have the concerns about expending money to hire a physician, to hire an attorney to go through the extent of injury dispute process. The carrier's not going to have these types of, the carrier is not going to have a motive.

JUSTICE NATHAN L. HECHT: A motive, they do have a motive to avoid the 60- day deadline.

ATTORNEY THOMAS M. LIPOVSKI: Well.

JUSTICE NATHAN L. HECHT: The carrier wouldn't care. The carrier would much prefer a 180-day deadline or a four-year deadline or something.

ATTORNEY THOMAS M. LIPOVSKI: And that could be a policy decision, Your Honor, but the rule is very explicit and very clear. There are deadlines for extent of injury disputes and those deadlines are 45 days from the date you receive, I'm sorry, may I finish, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: You can complete your thought.

ATTORNEY THOMAS M. LIPOVSKI: Those deadlines run the day of receipt of the medical bill. They do have a deadline. The only difference is there's no draconian provision with respect to waiver for not doing that within the 45 days.

JUSTICE DALE WAINWRIGHT: If you don't get the bill for six months, then you get six months plus 45 days.

ATTORNEY THOMAS M. LIPOVSKI: Justice Wainwright, that would be an unusual circumstance because you have to get billed within 95 days of

the treatment, but once you get that billed, then your 45-day timeline has started.

JUSTICE DALE WAINWRIGHT: So you get 95 days plus 45 days.

ATTORNEY THOMAS M. LIPOVSKI: If the doctor does not want to get paid immediately and waits the full 95 days, yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. Any further questions? The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Lewis will present argument for the Respondent. Ms. Caney will present argument for the Office of Injured Employee Counsel and Mr. Lewis will open with the first 15 minutes.

ORAL ARGUMENT OF STUART F. LEWIS ON BEHALF OF THE RESPONDENT

ATTORNEY STUART F. LEWIS: May it please the Honorable Supreme Court of Texas. As Counsel for SORM has said, this case is an appeal by SORM and [inaudible] appeal an award of workers compensation benefits in favor of Ms. Mary Lawton. This case involves the proper interpretation of Sections 409.021 and 409.022 as well as Rule 124.3, Rules of the Division.

JUSTICE NATHAN L. HECHT: Let me just ask you, what do you think the first sentence of that rule means?

ATTORNEY STUART F. LEWIS: Well, Judge, you have to look at the origin of the rule. The rule was adopted in the year 2000, nine years after the effective date of the major revisions to the Texas Workers Compensation Act and, at that time, there were some Appeals Panel cases that said that if there was a diagnosis after the 60-day period that that then started a new 60-day time limit for the carrier to waiver, to waive. So for an example, let's say an injured person had a back injury on day one and on day 120, a doctor diagnosed shoulder injury. This prior Appeal Panel said well, when the shoulder injury is diagnosed, another 60-day waiver period is started and the Division felt that that was not what the statute implied and so they adopted 124.3, I think, to limit the waiver period to the 60-day period, the initial 60-day period to which it was originally intended.

JUSTICE NATHAN L. HECHT: So you don't get another 60 days.

ATTORNEY STUART F. LEWIS: That's right.

JUSTICE NATHAN L. HECHT: But surely you can contend that the shoulder's not.

ATTORNEY STUART F. LEWIS: Absolutely.

JUSTICE NATHAN L. HECHT: The shoulder is not connected to the backbone.

ATTORNEY STUART F. LEWIS: And this case is not about that. In this case, we have.

JUSTICE NATHAN L. HECHT: You say absolutely, but then you say that's a part, if it happened in the first 60 days, they would lose their right to claim that this was not a furtherance of the initial injury.

ATTORNEY STUART F. LEWIS: That's right. That, I think, is the purpose of the waiver rule as well as 124.3 also says that the carrier has a duty to investigate the compensability of the injury. Another purpose of Rule 124.3 was to further define the duty of the insurance carrier to investigate the compensability of the injury.

JUSTICE PHIL JOHNSON: Counsel, let me ask you a question. What if someone falls, they go to the hospital and they find and the claim is

I've got a problem with my back, my shoulder's hurting and they also find that there's a heart problem in there. Now does the carrier have to dispute the injury in order to dispute the heart problem and the shoulder problem if the shoulder problem pre-existed? Or does it simply have to dispute they can or can they say, we're not disputing the injury, but we're not liable for this shoulder that he hurt three or four years ago and we're not liable for the heart problem, goodness sakes. What, how do we handle that? What's the dispute? Do they dispute the injury?

ATTORNEY STUART F. LEWIS: Well I think you have to look at what the injury is and what the, what is claimed by the, by the claimant. If the claimant's claiming a heart injury then I think they.

JUSTICE PHIL JOHNSON: They're not disputing that, they're not disputing the incident on the job.

ATTORNEY STUART F. LEWIS: Right.

JUSTICE PHIL JOHNSON: You fell backwards.

ATTORNEY STUART F. LEWIS: Right.

JUSTICE PHIL JOHNSON: And hurt something.

ATTORNEY STUART F. LEWIS: Right.

JUSTICE PHIL JOHNSON: They're not disputing that.

ATTORNEY STUART F. LEWIS: Right.

JUSTICE PHIL JOHNSON: So they're not disputing injury. So is it once we don't dispute the incident and some harm from it, do we then go into extent or do we have to dispute every particular part of the body and we.

ATTORNEY STUART F. LEWIS: Well, I think the carrier has a duty to investigate the compensability of the injury and the injury is all those areas that are, that were potentially damaged in the incident.

JUSTICE NATHAN L. HECHT: How can you investigate if you don't send him to a doctor? Wouldn't you have to send him to the, to every doctor there was to be sure it wasn't anything but a back injury or but a shoulder injury?

ATTORNEY STUART F. LEWIS: Well I think all the rule contemplates is that the carrier do a reasonable investigation within the 60-day period. Now I may point out that this bur--this rule is not a hard burden to meet by the insurance carrier. In our case, Mrs. Lawton just injured her knee. Now we're not talking about multiple parts of the body, but on day one, day one of the accident, she was diagnosed with a left knee contusion and a left knee sprain. On day nine, she was diagnosed with traumatic left knee pre-patellar bursitis and on day 26, we have an MRI that says that she had severe chondromalacia of the left knee. Now all of those diagnoses pertain to the left knee and what the.

JUSTICE SCOTT A. BRISTER: How soon did the day 26 report get to the carrier?

ATTORNEY STUART F. LEWIS: It got to the carrier, actually I misspoke. Day 26 is when the carrier received the MRI report. The MRI report was done about five or six days earlier than that.

JUSTICE SCOTT A. BRISTER: So under the Court of Appeals' opinion even though you have a firm 60-day window in the statute, they really had 34 days to deny that claim or to admit compensability?

ATTORNEY STUART F. LEWIS: Right, that's right. The 60-day period is their period to investigate the claim and they're supposed to do a thorough investigation.

JUSTICE SCOTT A. BRISTER: If it had been day 56, they'd had had four days.

ATTORNEY STUART F. LEWIS: Now that, that was pointed out at some of the Amicus briefs is is this an unfair rule, what if you got the

report on day 58 or 59 or something like that, but there's a standard of reasonableness in the rule or as interpreted by the Appeals Panel and there have been subsequent appeals found decision.

JUSTICE SCOTT A. BRISTER: Well the whole idea of this system was to take it out of the courts and if the dispute's going to be what should the carrier should have known before the 60-day deadline closed, every case is going to be in court.

ATTORNEY STUART F. LEWIS: Well I think if it's a late document that came into existence on day 59 or day 60, I don't think, I mean, those cases, there have been Appeals Panel cases where the appeals of the contested case hearing office, which is an administrative judge found that well if day 59, they didn't have enough time to find that.

CHIEF JUSTICE WALLACE B. JEFFERSON: How much time do they get then? How much additional time to do they get to contest? Is that just up to the administrative judge or what?

ATTORNEY STUART F. LEWIS: Well the rule is whether or not the diagnosis was reasonably discoverable within the 60-day period.

JUSTICE NATHAN L. HECHT: But if they get past 60, they've got forever.

ATTORNEY STUART F. LEWIS: That's right, absolutely. If the MRI, in our case, had been done on day 75, they'd have no duty to deny it at all.

JUSTICE NATHAN L. HECHT: Well get to Judge Brister's back to Judge Brister's question, it just seems to me a terrible idea to have this huge heavily laden issue because it's going to determine whether you can assert lack of compensability or not, depend on whether you did enough investigation prior to 60 days. Isn't that a terrible idea that?

ATTORNEY STUART F. LEWIS: No, it doesn't. I think it compels the insurance carriers to do their job and I just want to make one point here. The Appeals Panel has said that an insurance carrier may make a limited denial of the claim. In fact, in this case, SORM could have easily come in and said we think it's contusion. We deny. We accept a contusion and we deny all other diagnoses.

JUSTICE NATHAN L. HECHT: Well I read that and I thought well isn't that just what they're going to do and so then why are we here?

ATTORNEY STUART F. LEWIS: Well they didn't do that. They didn't [inaudible].

JUSTICE NATHAN L. HECHT: But if they start doing it, then why are we here?

ATTORNEY STUART F. LEWIS: Well if they do that, at least, at least the injured worker's put on notice from early on in the claim that we've got a dispute and she can proceed on through the dispute resolution process of the division.

JUSTICE SCOTT A. BRISTER: You can do that as soon as they send a bill for the other stuff. She didn't lose anything.

ATTORNEY STUART F. LEWIS: Well, she does lose something because often times the bill that's disputed is much later in the process. In our case, we had, she was diagnosed with a contusion and a sprain. She went to a doctor within a week and he said no, it's more than that and she had an MRI and the MRI said severe chondromalacia of the left knee, which is a serious.

JUSTICE SCOTT A. BRISTER: If they're going to do anything expensive, they're going to have to get preauthorization anyway.

ATTORNEY STUART F. LEWIS: Right.

JUSTICE SCOTT A. BRISTER: But what happens is usually the claimant has some conservative care before they jump right to surgery and, in this case, that's what happened. Ms. Lawton had therapy for a period of

time and then finally and benefits were being paid. All medical bills were being paid and then when we got down to surgery, which was months later, then the dispute comes and this is, this is how this case, how this ruling, the argument of SORM would be so abusive, they would have, potentially someone could not deny a claim, pay the medical for years and years and years and then finally say, you know what? We're tired of paying on this case. We're going to assert this is only a contusion even though they accepted everything and paid everything up to that point.

JUSTICE DALE WAINWRIGHT: But, Counsel, the irony of your position is the tighter you make the window on being able to allege extent of injury rather than compensability, the more you're going to encourage carriers to deny the claims on the front end because you're going to make the hole to jump through on the extent of injury smaller. So you're going to encourage more denials rather than parties trying to take a good-faith look at what is really compensability and what is really extent.

ATTORNEY STUART F. LEWIS: Well if the carriers do their job, thoroughly investigate the case and in good faith file it now within the 60 days, I have no problem with that. At least the parties know what their positions are from the very beginning.

JUSTICE PHIL JOHNSON: Well but aren't you encouraging a carrier when they get the, the employer has to send a report in pretty fast as I recall and the patient goes to the hospital and I think this was mentioned earlier. Aren't you forcing the carriers to say someone fell at work, all we're liable for is a bruise. Immediately, that's, they're going to say that immediately. I mean you got a denial and then you're into a controversy and really no one wants to controvert this. They want the person to get treatment and the next thing you know, you're spreading the parties out. Isn't that the net effect of that?

ATTORNEY STUART F. LEWIS: I don't believe so. I think we're just talking about a duty to be diligent by the insurance company to investigate the claim. What happened in this case and what happens so often is insurance companies just rock along and as long as it's not running up too many bills, they're just fine with everything.

JUSTICE DAVID M. MEDINA: But this is like everything else. If you're defending a case, seems fine, work within a budget and all of a sudden you get these extraordinary bills and someone's asking you a question and it raises a flag. So that's not unusual.

ATTORNEY STUART F. LEWIS: Well except that here we have a statute that says you must deny the claim within 60 days. That standard is contained in both 409.021 and 409.022.

JUSTICE DAVID M. MEDINA: So the insurance carrier denies the initial claim. Can they go back and re-evaluate and say we made a mistake. We're going to pay this now. They can do that right?

ATTORNEY STUART F. LEWIS: Certainly.

JUSTICE DAVID M. MEDINA: Then why not just deny them all and then go back and re-evaluate them so they don't have to have this problem? I think that's seems the way to.

ATTORNEY STUART F. LEWIS: Well they could if they wanted to, but I think that would be in derogation of their responsibilities as an insurance carrier to follow along and their duties to the injured worker, who is their insured, after all. An injured worker is entitled to be treated as a first-part insured to a workers comp carrier.

JUSTICE SCOTT A. BRISTER: But, I mean, your argument is even if the worker didn't file a claim, they ought to be reasonable and go out there and investigate it. I mean the whole and it's still somewhat an

adversarial system. The patient comes; the worker comes in and says, this hurts. Whatever it is hurts and then the insurer responds to that. Where your system is the patient says, comes in and says something hurt, now tell me what it is and if they can't figure out, then they have to pay for whatever it is. It seems backwards from the whole way the system puts the purpose of a notice of a claim if it's not to put them on notice of the claim.

ATTORNEY STUART F. LEWIS: Well I think the notice of the claim puts them on notice that there's an injury that notice triggers the duty to investigate what the scope of the injury is.

JUSTICE SCOTT A. BRISTER: [inaudible] trigger a duty to be as ambiguous as you can be because if then I can argue they should have discovered it later even though I didn't tell you that hurt at the time, then I get it all paid. I get my chiropractor bills paid forever.

ATTORNEY STUART F. LEWIS: Well that would only apply if there was something to indicate that the that there was that diagnosis. I don't think it would apply to a diagnosis they have not yet made or potentially could be made. We're only talking about a 60-day period. We're not talking about a long period, but this statute. It's, this goes back to the statute. The statute was put in to compel insurance companies to be diligent and to respond to the initial claim promptly.

JUSTICE HARRIET O'NEILL: Let me talk about the rule real quick and make sure I understand your argument. If we were to consider this an extent of injury dispute, would you agree the plain language of Rule 124.3E defeats your argument? I mean does it rise or fall on extent?

ATTORNEY STUART F. LEWIS: I think the term "extent of injury" is a very unfortunate use of, my argument as I have said in my brief is that extent of injury is an undefined term. There's no definition of extent of injury in either rules or the statute. It's just there.

JUSTICE HARRIET O'NEILL: But there in the case law and if we were to determine that under the law this is an extent of injury, do you agree that the plain language would control?

ATTORNEY STUART F. LEWIS: No because I think the, what the Tenth Court of Appeals as well as the Fifth Court of Appeals in Dallas have said is that this Rule 124.3E is talking about disputes that arise after the 60-day period. Now, what Counsel for SORM has said about well, the extent of injury means medical disputes. The rules about medical disputes are completely different. That just means does the bill get paid. It doesn't have anything to do with the underlying injury and whether the underlying issue is compensable or not. So.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The Court will hear from the Amicus Curiae Office of Injured Employee Counsel.

ORAL ARGUMENT OF ELAINE CHANEY ON BEHALF OF THE RESPONDENT

ELAINE CHANEY: May it please the Court. My name is Elaine Chaney and I'm with the Office of Injured Employee Counsel, which was created to protect the injured employees as a class and we're here to urge that the Court of Appeals decision be firm because I do think that this is an instance where this is a waiver issue and not an extent issue and the.

JUSTICE HARRIET O'NEILL: Do you think the argument rises and falls on whether we determine it is extent versus compensability?

ELAINE CHANEY: Yes I do think it does rise and fall on that and I think the reason that you get to this being and how the analysis was

created and the question of the, the case law that talks about the nature of the injury will be defined what could reasonably discovered. I think that's the corollary to a 409.021D, which was an insurance carrier reopening the issue of compensability if there is newly discovered evidence and so I think this notion that what you can find, the information that you can find during a reasonable investigation, defines the nature of the compensable injury follows from the notion that you cannot reopen, that you can reopen compensability only if there's evidence that you couldn't have reasonably discovered in the 60-day period.

JUSTICE DALE WAINWRIGHT: So put a year argument together with your partner Counsel at the table, there would be more denials especially if you could reopen it later with new evidence on compensability.

ELAINE CHANEY: There might be more denials, but I think.

JUSTICE DALE WAINWRIGHT: Your position encourages more denials. If the ability to argue extent is narrowed, then insurers are going to deny more claims earlier if there's any doubt.

ELAINE CHANEY: Well I think what this does is it, this gives the insurance carriers based on their duty to investigate, they need to determine what the nature of the injury is and then if they determine that there's something in the medical records that they could reasonably discover in 60 days and something that they don't think is related to the compensable injury, they file, they can file as a limited acceptance that says I think if this is, that the injury is limited to the contusion or the sprain/strain, whatever it might be and then this is inconsistent with the purpose of.

CHIEF JUSTICE WALLACE B. JEFFERSON: If I were counsel for the carrier, that's would I encourage the carrier to do. In any case where there's an injury and it looks, even on the face of it, it doesn't look that severe, then make sure that you limit your acceptance of compensability and why wouldn't that be the case and why, how would that promote the interest of employees?

ELAINE CHANEY: Well it would probably be of interest to employees in the sense that what happens in this instance is not unique and it happens very frequently. The cases will go on for very long periods of time and treatment is given and then is only when there's a surgery or the more-expensive treatment that there is then the denial and the injured employee is then in the position of establishing, going back and trying to establish the cause and connection late at this point and if early on the decision is made that we're going to, we believe it's limited to the contusion in this incidence, then the injured employee and the doctor have an opportunity early on the in the process to know and everybody gets on the same page about what is being accepted and if the injured employee then has to come forward and meet their burden of proof, it's earlier on in the process, time has not gone on. There isn't and a big thing in workers comp always is the hassle factor and we go on and on and things they paid for and then years later, when suddenly something isn't paid for and this is consistent with the notion and what happened in the '89 Act was to try to get the process streamlined and to make it so that people understood what was going to be paid for and what was not going to be paid for.

JUSTICE PHIL JOHNSON: It seems like if you go the other way that you, if everything, if the carrier is not minding paying for everything, in most cases you're not going to all of a sudden develop a much serious something later on down the road and if the carrier will accept these claims, whatever they are and start paying for them, that takes friction out of the system, which is what we thought the

modification was about, to take the friction out of the system and in most cases, you're probably not going to have a degenerative something arise later on are you in the majority of cases?

ELAINE CHANEY: I think the problem is that this is not an unusual fact situation. It's, people start out getting conservative treatment, but conservative treatment ends up not being successful in correcting the problem and then suddenly a surgery is required and that's when the process grinds to a halt and when the dispute exists.

JUSTICE PHIL JOHNSON: But we really do want them to pay upfront. We don't want the friction upfront?

ELAINE CHANEY: No, I agree. We want them to pay upfront.

JUSTICE PHIL JOHNSON: If the carrier's forced to deny anything other than a minor injury, if they have to deny anything other than a minor injury right upfront, we immediately introduce friction of some nature and only because the employee and the employee's representative then has to say wait a minute. You know, this might develop into a back problem or a nerve problem or something like that and we have to dispute all that within the 60 days instead of just letting the carrier pay and pay and pay and then if we develop a problem, we talk about the extent of it when that arises. It seems like we're frontloading friction by your position.

ELAINE CHANEY: May I finish?

CHIEF JUSTICE WALLACE B. JEFFERSON: [inaudible] please.

ELAINE CHANEY: I think that what we're doing is permitting the injured employee and the doctor and the insurance carrier, everyone figuring out what the injury is and if we're going to have a dispute and I think we have to keep in mind that the only thing that they're going to waive is anything they could discover in the 60 days so if anything that happens that arises and they don't know about, until after the 60 days isn't subject to being waived and I think this just permits the, it's consistent with having the carrier live up to its obligation to do a reasonable investigation, to engage in due diligence and to let the injured employee and the doctor know what injuries are going to be paid for and what injuries are not.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you very much.

JUSTICE DON R. WILLETT: Does SORM see or acknowledge any sort of outer limitation whatsoever as to when a carrier can assert an extent of injury dispute?

REBUTTAL ARGUMENT OF THOMAS M. LIPOVSKI ON BEHALF OF PETITIONER

ATTORNEY THOMAS M. LIPOVSKI: Well certainly it's within 45 days, Your Honor. Justice Willett, the key is what is the consequence to the employer failing to do so. Here the consequence of the employer or of the carrier failing to do so is not waiver. It creates a compliance issue. There may be penalties with not doing it within a timely manner, but there is no waiver. That's specifically set out in the Texas Register which said this creates that type of issue. It doesn't create liability.

CHIEF JUSTICE WALLACE B. JEFFERSON: What are the penalties and when and how do they arise?

ATTORNEY THOMAS M. LIPOVSKI: The compensability, guess the payment involved or the penalties involved are pursuant to a formula, which I think is set out in the Texas Administrative Code Section 180. It depends on factor and I wouldn't really be able to walk you through all

of the factors that relate to that, but there are provisions through which the penalties be applied.

JUSTICE DALE WAINWRIGHT: How often does this extent of injury dispute, like the one in this case, arise?

ATTORNEY THOMAS M. LIPOVSKI: Well, Your Honor, I don't know if we have necessary statistics that explain when this type of extent of injury disputes come up.

JUSTICE DALE WAINWRIGHT: What is your sense?

JUSTICE DALE WAINWRIGHT: There is some briefing and some materials that were prepared by Amicus Texas Mutual Insurance Company, which include a report by the Texas Department of Insurance that reflects that these disputes run; I want to say, between 14 to 16% of the overall disputes. That may be off a hair, Your Honor.

JUSTICE PHIL JOHNSON: I'm sorry, I didn't understand the number.

ATTORNEY THOMAS M. LIPOVSKI: Somewhere I believe between 14 and 16%.

JUSTICE PHIL JOHNSON: 14 and 16%?

ATTORNEY THOMAS M. LIPOVSKI: If I may, may I.

JUSTICE PHIL JOHNSON: I just didn't understand what you said.

ATTORNEY THOMAS M. LIPOVSKI: Yes, Your Honor, and I may be off on that and I apologize.

JUSTICE PHIL JOHNSON: In the brief though

ATTORNEY THOMAS M. LIPOVSKI: It is in, if you refer the Amicus Brief of Texas Mutual Insurance Company, there are statistics including numbers and percentages of the disputes that the extent of injury disputes make up.

JUSTICE DON R. WILLETT: What's the 45-day period you mentioned in response to my question earlier?

ATTORNEY THOMAS M. LIPOVSKI: I'm sorry; I didn't get the full question.

JUSTICE DON R. WILLETT: What's the 45-day period you mentioned in response to my.

ATTORNEY THOMAS M. LIPOVSKI: That's referenced in Rule 124.3E specifically, Your Honor. It's 45 days from the date of receipt of the medical bill.

JUSTICE DALE WAINWRIGHT: And the medical bill has to be sent within 95 days.

ATTORNEY THOMAS M. LIPOVSKI: That's correct, Justice Wainwright.

ATTORNEY THOMAS M. LIPOVSKI: Now there's a lot of discussion by opposing Counsel regarding the carrier's duty to investigate and I want to reiterate again under Rule 124.3A that sets out several types of things carriers have to investigate. It doesn't mention extent of injury. Indeed Rule 124.3 specifically excludes extent of injury from those types of things that need to be investigated and we need to take a look at what the reason is for that or who that harms. If a carrier does not investigate extent of injury, the carrier's going to be paying benefits for the injury for a longer period of time. The carrier has to pay benefits as they accrue. They can't terminate or reduce benefits until they have reasonable or unless they have reasonable grounds to do so and then they can't actually terminate or reduce those benefits until 10 days prior to giving notice of the termination of the benefits. So the carrier waits to investigate. The only person really harmed here is the carrier. The employee actually benefits by having longer than the 60 days. The employee actually gets the benefit of having that notice of the medical bill plus the 45 days because they're going to be receiving benefits which otherwise would have been likely terminated if an extent of injury dispute was filed.

JUSTICE DALE WAINWRIGHT: And if the carrier wins on the extent of injury claim, does the employee have to pay back the benefits?

ATTORNEY THOMAS M. LIPOVSKI: In that situation, Your Honor, the carrier would look to the subsequent injury fund, which is funded by I guess ASPA, situations where there is a wrongful death and there's no beneficiary to pay wrongful death benefits to. So it looks to the Subsequent Injury Fund, Your Honor.

JUSTICE DALE WAINWRIGHT: So the employee doesn't have to pay any of those benefits that were inappropriately paid.

ATTORNEY THOMAS M. LIPOVSKI: No, it does not go back to the employee to do so.

JUSTICE NATHAN L. HECHT: So if she hurt her knee and looked as it if could be treated conservatively, but 120 days, it looked as if it was going to require surgery would that be an issue compensability or extent of injury?

ATTORNEY THOMAS M. LIPOVSKI: It would be an issue of extent of injury, Your Honor. The extent of injury issue is something that is sort of formed a long time. It continues a long time. The compensability issue is one that's decided in the 60 days, which is was there an injury at all that would be covered. Then what's the scope of it? That is defined over the course of receiving medical bills, making evaluations as to the medical bills and either paying or denying them.

JUSTICE NATHAN L. HECHT: So your view of the rule is that the waiver in the statute is not very extensive. It's on the job or off the job, was it intentional or not, was the person intoxicated, whatever the few exceptions there are right?

ATTORNEY THOMAS M. LIPOVSKI: The waiver and the statute provides, is a waiver of events to all liability for paying in for benefits. It's a valuable right that's being given up, but it is only limited to that totality of the circumstances.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted and the Court can take a brief recess.

MARSHALL: All rise.

2009 WL 742020 (Tex.)