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Supreme Court of Texas.
Texas Mutual Insurance Company, Defendant Below, Petitioner,
v.
Timothy J. Ruttiger, Plaintiff Below, Respondent.
No. 08-0751.

April 14, 2010.

Appearances:

Peter M. Schenkkan, Graves Dougherty Hearon & Moody, PC, Austin, TX, for petitioner.
Byron C. Keeling, Keeling & Downes, P.c, Houston, TX, for respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08- 0751, Texas Mutual Insurance Company v. Timothy J. Ruttiger.

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

ORAL ARGUMENT OF PETER M. SCHENKKAN ON BEHALF OF THE PETITIONER

ATTORNEY PETER SCHENKKAN: May it please the Court, I'm Pete Schenkkan on behalf of Texas Mutual Insurance Company and with me at counsel table to-

day is Texas Mutual's general counsel, [inaudible]. We're very grateful to the Court for its attention to this burgeoning problem that they had faced causes of action in the workers compensation [inaudible] and I'm very grateful to have the opportunity to make the argument today. We're asking the Court to hold that because of the labor code, first the common law cause of action no longer applies in workers compensation. It's not a radical proposal.

JUSTICE HARRIET O'NEILL: That's not really before us, correct?

ATTORNEY PETER SCHENKKAN: It will be if I'm right about the second, which is that the insurance code cause of action does not apply in workers compensation. If not, then not. If the insurance code applies, then you'll have to reach and disclose of the case on some ground and we'll not reach the common law.

JUSTICE PHIL JOHNSON: What about the DTPA claim?

ATTORNEY PETER SCHENKKAN: The DTPA claim is being referred to as an insurance code claim, what's happened in the sequence of events is what used to be the DTPA, then became 2121 of the insurance code and of the insurance statutes and is now the insurance code, the relevant part added in 1995.

JUSTICE PHIL JOHNSON: The trial court judgment says the recovery is on the basis of insurance code good faith, bad faith and DTPA simply all rolls into the insurance code.

ATTORNEY PETER SCHENKKAN: Yes. As to Justice O'Neill's question, again because of the labor code, the insurance code actions for unfair settlement practices and that's the ones that we're dealing with here do not generally apply to workers compensation, the labor code prohibits settlements with exceptions not relevant here, including of lifetime medical benefits and including of most income benefits. You can't do what common law cause of action was created to do and what you can do in first-party insurance, you can't do in workers compensation and instead of settlements and settlement practices, the labor code provides for disputes, including whether a work-related injury occurred at all, an issue in this case, whether it extends to a particular body part or condition, an issue in some of the other cases that are pending in one state or another before this Court and whether particular surgery is medically necessary to treat a particular condition or not, an issue addressed in re: Liberty Mutual by this Court and pending in different facts in a variety of the other cases, but for all of those disputes, the labor code gives the division of workers compensation the exclusive authority to decide those disputes and to say what the carrier must do in investigating before it makes a dispute and in disputing and to punish the carrier who does not do it right. In addition to the merits, which I intend to address further, I expect the Court's questions include how is holding that because of the labor code, the common law and insurance code causes of action to not apply in workers compensation different from and a better alternative than enforcing Fage and Aranda and this Court's standards for no evidence review, a bad faith liability, knowing violations and [inaudible]. Honorable opposing counsel suggests that it's no different, that the answer is the same that the effect

of enforcing FAGE and ARANDA, as I believe our briefs demonstrate, they should be enforced, would mean that there would be essentially no viable causes of action for bad faith claims handling in the workers compensation context and this may be one of the few points on which we agree. I think that's essentially correct that properly enforced, FAGE and ARANDA would mean and certainly if there were any left, the bad faith standards, would mean that there won't be a bad faith claims handling judgment against a workers compensation carrier that is ultimately affirmed. So why is that not an adequate solution? Well because to get there, we're going to have to have appellate decisions including by mandamus like in re: Liberty Mutual on every single fact scenario until they have all been resolved and it is clear that there is no end run available around FAGE, ARANDA and the no-evidence review standards. A second question I imagine the Court will have is will such holdings leave a bigger gap for potential abuse by a carrier. And the third question, which we've already touched on, is the Court free to address these questions in this case. I think the broader holding is the better result because it will achieve the labor code's goals--quick relief to the worker in fixed and limited amounts specified in the labor code not found by juries or decided by bargaining between the carrier and the worker.

JUSTICE EVA GUZMAN: How is it quick relief when an injured employee cannot get I guess positive findings, if you will, of compensability or necessity, just can't do it. How is that quicker?

ATTORNEY PETER SCHENKKAN: He can if he uses the remedies the labor code provides for that.

JUSTICE EVA GUZMAN: Let's just say that there is an agent out there that just refuses.

ATTORNEY PETER SCHENKKAN: Under the labor code, as soon as the carrier disputes compensability as it did in this case well within the 60 days, then that day the worker or his lawyer and this worker was represented, can ask for the first step in the process, a benefit review conference or if it's an urgent matter can say we need to skip that step and go straight to the one that's binding, a contested case hearing where compensability will be decided and an order, if it found compensable, an order that the carrier will pay will be entered. How long does that take? An average of 45 days, according to the data published by the agency, as of the timeframe of this dispute. If it needs to be faster, and certainly we can see there are some workers who may be because of the nature of their injury, in severe physical pain or suffering from a condition that will worsen rapidly or risks worsening rapidly if they don't get both a medically, authorization for surgery medically necessary on a compensability ruling if the doctor's not willing to operate until the compensability's decided, there may be a worker who needs an answer faster than 45 days and the labor code addresses that. The labor code says that if the [inaudible] say this is why we need it this much faster and they have a good reason, then the division shall set that hearing in not more than 20 days and if even that is not fast enough, then the labor code provides and the Court referred to this in Lawton in dealing with the extent of injury issues, that the worker and his lawyer can get an interlocutory order that says this

worker can't wait so, carrier, you must start paying now even though we recognize you are disputing whatever it is in this case, compensability and in the hypothetical what wasn't the facts of this case, preauthorization and medical necessity. Then what happens if the carrier later wins. Do they get their money back from the worker or the doctor? Of course not. They have a claim against what's called a subsequent injury fund.

JUSTICE EVA GUZMAN: So the carrier through the agent can just act in bad faith if they want to because the worker can pursue these other "quicker" remedies.

ATTORNEY PETER SCHENKKAN: The carrier has no incentive to act in bad faith because assuming the facts that we're talking about, there is a worker who has a serious physical problem that requires immediate action and he's right on compensability, the carrier is achieving nothing by a bad faith denial of that claim and the carrier is risking, is risking penalties at $25,000 a day levied by the division.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are punitive damages provided for in the labor code?

ATTORNEY PETER SCHENKKAN: They are not and, of course, that's as I know you know, Mr. Chief Justice, that' one of the fundamental parts of the workers compensation statutory bargain set by the legislature that in return for the quick and fixed and definite benefits with almost no-fault issues allowed, we won't have pain and suffering damages and we won't have punitive damages. Those are the remedies.
JUSTICE HARRIET O'NEILL: In terms of punitive damages, in the 1993 amendments to the labor code, the legislature seemed to acknowledge that there was a bad faith cause of action by capping any sort of exemplary damages in such an action. What are we to make of that?

ATTORNEY PETER SCHENKKAN: I suggest the right way to read that language, which I believe actually was in the big 1989 reform. It got codified into the labor code I think in '93, but I think the right way to read that as this legislature which in this massive effort that took the regular session and two special sessions and came down to the wire whether they could do it at all, passed this huge reform of the workers compensation statute that among other things addressed both of the common law, the problems that led this Court six months earlier in ARANDA to say the common law action would be extended to workers compensation and the legislature said we're deferring to the Texas Supreme Court in its exercise of common law authority to look at our work, our statute and see if this problem still exists. I think it's a separation of power or statement. It's recognizing that it's up to this Court to say whether now that the statute has been radically transformed and cured these defects, we still need the common law [inaudible].

JUSTICE HARRIET O'NEILL: Wouldn't that sort of be an odd thing for a legislature to do? To specifically include a provision on exemplary damages that speaks to a cause of action for good faith and fair dealing? Aren't the incorporating what the Supreme Court has done in acknowledging, how could we ignore that?

ATTORNEY PETER SCHENKKAN: I'm not asking you to ignore it. I'm asking you to interpret as what I believe it was, which was a deferential statement by the legislature that that cause of action, the one that was applicable in 1989, the common law one, is a common law cause of action. The Court created it six months earlier in light of the Court's grading of the previous legislative work, the previous statute as getting an F for providing immediate relief to workers and for preventing workers from having the denial of immediate relief under the old law, the carrier did not have to pay until the worker had gone all the way through the court system, all the way to final judgment and won and under the old law, the carrier could use that leverage to say to the worker, well if you don't want to have to wait five years to see what you get from the court system, I will settle with you, but only for two years of future medical benefits and this lump sum for income benefits and the legislature prohibited that in 1989 and what I am submitting to you, Justice O'Neill, and this is absolutely for you to say, but I do think this is the likely meaning of it.

CHIEF JUSTICE WALLACE B. JEFFERSON: It's not unheard of for the legislature to pretty directly address a decision of this Court and say we're going in a different direction with this, the adoption of this provision of statute. Is there any evidence of that here that says okay, we understand

ARANDA and the whole history behind bad faith litigation, but we're going to go another direction and, as you say, preclude this sort of common law right because of the adoption of the labor code.

ATTORNEY PETER SCHENKKAN: There is nothing more specific, there is nothing else in what is now the labor code that this has any more specific reference one way or the other to the common law cause of action and, of course, none whatsoever to the insurance code private cause of action and [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: And [inaudible] legislative history along those lines or not?

ATTORNEY PETER SCHENKKAN: Well none that I've been able to show. The question that I would take up next unless there are further questions on this issue would be would the broader holding that we're not going to rely on FAGE or ARANDA and the no-evidence review of bad faith liability knowing violation and mental anguish to prevent abuses of this cause of action in the workers compensation context, would the broader holding widen a gap for bad faith that could harm workers and I've started by in response to Justice Guzman's questions, trying to indicate that there is not much room for that at all under the actual labor code now assuming we have a worker with these problems, that worker is supposed to be able to get and the carrier can't do anything to prevent it even if it wanted to, relief as quickly as immediately if it's truly something that needs to be done that day. And that the carrier that for no good reason with no incentive to do so says well even so, I'm going to in bad faith deny this, is running a big risk, $25,000 a day is a lot of money. But then further I would say this Court has in the three times that I'm aware of it where it has dis-

cussed this possibility in Aranda Stoker and Fage and said we reserve the possibility of liability for extreme misconduct that produces a genuinely impended injury. Well, I'm submitting to you that that would include that's not the [inaudible] but it would certainly include the tort of intentional infliction of emotional distress. That tort is one that comes with a much higher requirement of outrageousness of conduct and of intent and of consequences and is, therefore, much less susceptible to abuse than bad faith claims handling, but it means, in answer to your question, Justice Guzman, that at least if the carrier's conduct really was truly outrageous beyond the bounds of civilized conduct, this Court said in the context of this Court, and the Court, the carrier was actually aware that its conduct exposed the worker to a risk of death, serious bodily injury or imminent financial ruin and perhaps under the scenario we're doing as a hypothetical, that would be the case. Perhaps this is a case in which the worker says I'm about to die or have serious bodily injury if I don't get this surgery, but my doctor won't operate because he's afraid he won't be paid, go ahead and do it and the carrier says no, I'm going to deny it anyway and the worker gets that benefit through the division of workers compensation, then perhaps under that scenario, that authority would apply.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, are there any further questions? Thank you, Mr. Schenkkan. The Court is ready to hear argument now from the respondent.

MARSHAL: May it please the Court, Mr. Keeling will present argument for the respondents.

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

ATTORNEY BYRON KEELING: May it please the Court, I will begin first with TMI's arguments about the viability of Mr. Ruttiger's claim and then I will address its exhaustion arguments and its independent injury arguments. TMIC says that Mr. Ruttiger had neither a viable Texas Insurance Code or common law bad faith cause of action. With respect to its arguments on the Texas Insurance Code, TMIC says that Mr. Ruttiger failed to meet the statutory prerequisites to bring a claim. This Court just two weeks ago in the re: USAA case held that the failure to meet statutory prerequisites goes to the plaintiff's right to pursue a claim. It does not go to the trial court's subject matter jurisdiction. That's significant in this case because TMI did not raise any argument about whether Mr. Ruttiger met the statutory prerequisites for a Texas Insurance Code claim in either the trial court or the Court of Appeals. It makes that argument now, for the first time in this Court, respectfully it's waived the argument. With respect to its argument on the common law bad faith claim, Justice O'Neill, you raise the point that that's really not an issue and that's correct because the trial court entered judgment on Mr. Ruttiger's Texas Insurance Code claim, not on the common law bad faith code, but moreover, this Court in Cash America, 35 Southwest Third 12th recognized that this Court consistently has refused to construe statutes to deprive citizens of common law rights absent of clear expression of legislative intent that that be the case. The Texas legislature has not clearly expressed any intent to overrule ARANDA or eliminate the common law cause of action for

bad faith. On the contrary, the Texas legislature has explicitly recognized the continued existence of a common law cause of action for bad faith in Section 416.001 and .002 of the Texas Labor Code.
JUSTICE NATHAN L. HECHT: The question is whether the top scheme as a whole sort of doesn't overrule Aranda. It just makes a dead letter.

ATTORNEY BYRON KEELING: Well, of course, what this Court giveth, the Court can always take away and this Court gave in Aranda, but that begs the question why. Why does this Court need to revisit Aranda? If there were a clear legislative intent that the Texas legislature never contemplated a common law bad faith cause of action, that might be one thing. There's no such legislative intent here and moreover, there's really nothing in the legislative scheme that contemplates that there should be a change in the common law rule. Essentially boiled to its essence.

JUSTICE NATHAN L. HECHT: That's sort of the heart of the argument that the compensation scheme is comprehensive enough now and deals with all these problems that you don't need a sort of free-floating common law cause of action for bad faith. You can go and get your specific problem addressed through the compensation system.

ATTORNEY BYRON KEELING: That is TMI's argument and it begs the question at what point then did we pass the threshold. This Court, for example, has enacted extensive rules that govern civil procedure. Arguably, those are more extensive rules of procedure than even the workers compensation rules, but some lawyers still act in bad faith and breach the rules. That's why we have sanctions provisions to make sure that we have a vehicle to punish those lawyers who do abuse these sets of rules.

JUSTICE PHIL JOHNSON: They say that Compactt now has those sanction provisions, has real teeth in it whereas it did not used to be and the three bases for Aranda have been taken care of by the Compacttt amendment.

ATTORNEY BYRON KEELING: I'm not sure that I agree with that characterization. There will still be bad faith.

JUSTICE PHIL JOHNSON: But they say it doesn't matter because you can move pretty fast unless you just don't take advantage of those procedures that are provided for you to move fast and then six months down the road, you get a settlement and then sue them also, you leverage it up so to speak.

ATTORNEY BYRON KEELING: What hinges on the success of their argument is essentially their reliance on one provision in the workers compensation scheme. That's the provision that allows for permissively a party to pursue interlocutory measures. That really doesn't help them in the scheme of this case.

JUSTICE PHIL JOHNSON: Well in this case, your client, they started paying your client compensation while they investigated, is that correct?

ATTORNEY BYRON KEELING: They did pay income benefits while investigating the claim.

JUSTICE PHIL JOHNSON: [inaudible] that's right and that was a new change in the law. Under the old law, they didn't have to do that. They just had to controvert and then you went into the process about getting it heard and ruled on, was that correct?

ATTORNEY BYRON KEELING: With respect to income benefits, that is correct. Under the scheme and existence at the time, that's not true with respect to other benefits, in particular medical benefits. Once a carrier denies the compensability of a claim, then the compensability issue is to be resolved first in the agency. The medical necessity issues, if any, and I would argue that there were none here, are held in abeyance until after the compensability issues are resolved.

JUSTICE PHIL JOHNSON: Okay, but that was the same way in the old Act as it is in this Act, is that correct? If you denied compensability, you denied everything.

ATTORNEY BYRON KEELING: That is correct and that remained true at the time of the events in effect in this case.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY BYRON KEELING: And that really goes to the whole exhaustion issue, which is the next point that I wanted to address. TMI latches on language in FAGE saying that there must be a determination by the commission that benefits are due. TMI interprets the word "determination" to mean that there must be a final agency order after a contested case hearing. That's not what this Court said in FAGE nor is it consistent historically with how this Court has interpreted the exhaustion doctrine. Historically, this Court has interpreted the exhaustion doctrine simply to mean that if at the time the plaintiff files suit, there is an existing dispute between the parties, the agency should have an opportunity to resolve it first so that there's no risk of inconsistent adjudications. Considered in that light, TMI's exhaustion arguments all fail. TMI raises three exhaustion arguments. First, TMI says that a benefit dispute agreement cannot exhaust administrative remedies, but a benefit dispute agreement, by statute, Section 410.029 of the labor code resolves a compensability dispute. TMI argues that really a benefit dispute agreement is nothing more than a settlement agreement. That's not true. The Texas Labor Code explicitly says that the parties to a compensability dispute cannot settle it by statute. To resolve a compensability dispute, you have to have the agency's imprimatur and under Section 410.030, the way that the agency places its imprimatur on resolving a compensability dispute informally, is to sign and approve a benefit dispute agreement. Consequently, as the Court of Appeals found, the benefit dispute agreement is an agency order that resolves a compensability dispute. Your Honor?

JUSTICE NATHAN L. HECHT: Well, it's an odd dispute resolution agreement that doesn't resolve any disputes. I mean if you can still pursue bad faith, it sort of lessens the incentive of the carrier to agree. It doesn't seem to help the comp system.

ATTORNEY BYRON KEELING: That's TMI's argument.

JUSTICE NATHAN L. HECHT: Well isn't that true?

ATTORNEY BYRON KEELING: Well I think as the First District Court of Appeals found in re: Texas Workers Compensation Insurance Fund, the policy argument actually works the other way around. If the Court imposes a rule that says a benefit dispute agreement does not exhaust administrative remedies, then.

JUSTICE NATHAN L. HECHT: But my bigger question is what relief does the comp system not afford a claimant, an employee, that still needs to be provided for by the common law except the mental anguish that comes from having your claim denied or delayed.

ATTORNEY BYRON KEELING: Well certainly mental anguish is part of it.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY BYRON KEELING: As this Court know.

JUSTICE NATHAN L. HECHT: Is there anything else, that's what I'm wondering.

ATTORNEY BYRON KEELING: As this Court held in Aranda, workers compensation benefits in a vacuum can't compensate for the injuries that commonly result from the delay in workers compensation benefits.

JUSTICE NATHAN L. HECHT: Well what I'm asking is does the compensation system reduce or eliminate the delay?

ATTORNEY BYRON KEELING: The compensation system today is significantly better than it was 20 years ago, no doubt.

JUSTICE NATHAN L. HECHT: So does it reduce or eliminate the delay or not?

ATTORNEY BYRON KEELING: It does not eliminate the concerns that this Court had in Aranda and the facts of the cases illustrate why not. Mr. Ruttiger ...

JUSTICE NATHAN L. HECHT: Actually you wonder why if this was important somebody didn't do, in this case, in this particular case, get a resolution of the dispute sooner.

ATTORNEY BYRON KEELING: Well in Mr. Ruttiger's case, he tried. He sought an earlier benefit dispute conference. He showed up at a benefit dispute conference and initially the carrier did not, had to be rescheduled, got the first available setting thereafter and ultimately did get a benefit dispute agreement which resolved the compensability dispute, but there was delay as a result of the process.

JUSTICE PHIL JOHNSON: But he was injured in June?

ATTORNEY BYRON KEELING: Your Honor, the exact day I don't recall.

JUSTICE PHIL JOHNSON: Was about six months though before the first benefit review conference was even scheduled and it was several months after his injury that he was claiming that he even requested a benefit review conference as I understand the briefing.

ATTORNEY BYRON KEELING: Well there was a period of time in which Mr. Ruttiger was trying to get things resolved through his employer and then informally through the carrier at some point.

JUSTICE PHIL JOHNSON: But I thought pat of his complaint was the carrier never contacted him. So how could he be trying to resolve it informally if he's denying they ever contacted me.

ATTORNEY BYRON KEELING: He did have a communication with the carrier and the carrier's adjustor hung up on him.
JUSTICE PHIL JOHNSON: And told him he was denied? And then how long after that was it that he requested a BRC that.

ATTORNEY BYRON KEELING: I apologize, after the telephone conversation with the adjustor, the adjustor said on the phone is what I'm hearing is that you were injured in a softball game and hung up on him. Mr. Ruttiger, at this point, hired Mr. Mangionello and Mr. Mangionello then began to pursue administrative remedies in the Texas Workers Compensation setting.

JUSTICE PHIL JOHNSON: So at least within 60 days, the carrier had said we're denying compensability?

ATTORNEY BYRON KEELING: No question, within the 60-day window, the carrier.

JUSTICE PHIL JOHNSON: And then, but it's six months later before we ever have the first setting.

ATTORNEY BYRON KEELING: Six months after the injury.

JUSTICE PHIL JOHNSON: After the injury.

ATTORNEY BYRON KEELING: I believe that's correct.

JUSTICE PHIL JOHNSON: So within 60 days, the carrier had said there's a problem here, but yet we have another and not knowing the exact dates, we have another four months that lapses in there, the first setting, and then it's set reset one month later and that's the gap period for which this bad faith cause of action that's now his injury is '04, we're hearing it here six years later. That's the six-month period that he's complaining about that delay.

ATTORNEY BYRON KEELING: Well, again, remember that what Mr. Ruttiger's argument is is that the six-month window never should have been necessary. Within the 60-day period, the carrier has got to do an investigation and then it has a choice at the end of the 60-day window, at the end of the

60-day window, it can either pay the claim or it can deny the claim based upon good documented evidence according to the testimony of their own expert at trial and even then, the basis for the denial has got to be specified in the TWCC notice of dispute and it's that basis that locks the carrier in absent newly discovered evidence, which there was none here.

JUSTICE PHIL JOHNSON: Okay, we're still back to what Justice Hecht was talking about. We now have a system where the carrier has to start paying in order to get to 60 days so your client was getting paid and then when the carrier does, in fact, deny it, has to specify the reason why immediately, right then and there and that's locked in and then at that point, the individual can request a hearing and there's some time limit we've talked about and as I understand it, opposing counsel, the workers compensation division can order payments to be made with an interlocutory order and it seems like I think that's what Justice Hecht is going to. What is it that your client doesn't have other than just waiting for several months and then getting a dispute settlement and also getting a bad faith claim. It seems to me like it's leveraging up the system here.

ATTORNEY BYRON KEELING: There's two levels of problem. First of all, one problem is if the carrier drops the system, if the carrier offers up a basis for the denial, that lacks any good documented evidence or is itself in bad faith because it doesn't comply with the rules, then you've added an element of delay that didn't exist before. TMI's basis for solving the problem is just to say well wait, the employee at that point can seek interlocutory remedies so that he's not really at risk of significant problem during that delay period, but it's.

JUSTICE PHIL JOHNSON: And did he have or not have those under the prior system?

ATTORNEY BYRON KEELING: Those interlocutory remedies were not available under the system in place at the time of Aranda nor are those remedies that are mandatory on the DWC even now and as Amicus Pete Rogers pointed out in his brief, rarely does the DWC grant those interlocutory remedies even if they're requested if they're opposed by the carrier. So the period of delay, whether it's four months here or whether it was eight months as in the Morris case pending before this Court, still is a time period that exists and under Aranda's potentially something that should be compensable if the employee has suffered independent injuries from the carrier's conduct. Another argument that TMI goes on to make with respect to exhaustion is that there were medical benefits that were still in dispute between the parties. That's not the case. There was never a medical necessity dispute at all between the parties. Mr. Ruttiger's doctors requested orally preauthorization and the First District Court of Appeals' opinion in Stenson, a case in which this Court recently denied the petition for review from the carrier, the First District Court of Appeals recognized that an oral request for preauthorization is perfectly appropriate and that request for preauthorization then triggers the duty on the carrier to respond within three days. The carrier here never denied medical necessity within three days. On the contrary, the day on which Mr. Ruttiger's doctors requested preauthorization, what TMI did and perfectly within its rights to do so if it had good documented reasons for denying compensability, was to deny

compensability. That's all it did. It did not deny the medical necessity of Mr. Ruttiger's treatment and, in fact, after the parties entered into the benefit dispute agreement that resolved their compensability dispute, TMI promptly began paying for Mr. Ruttiger's requested treatment under Section 413.014 of the Texas Labor Code, the carrier's decision to pay benefits is binding on the carrier and at that point, resolved any question at all about the medical necessity of Mr. Ruttiger's treatment. At that point, there was no procedural mechanism by which Mr. Ruttiger could attempt to obtain any more remedies from the administrative agency because there's no procedural mechanism that allows a party to seek an agency approval of benefits that the carrier's already paying. On TMIC's argument about interlocutory remedies, I've addressed this to some extent already, but this Court has repeatedly ruled that interlocutory procedures need not be exhausted for purposes of the exhaustion doctrine, Combs is one such case, 183 Southwest Second 716.

JUSTICE NATHAN L. HECHT: Let me interrupt you, do you have a view on why the issue seems to have arisen in so many cases all of a sudden?

ATTORNEY BYRON KEELING: I really don't, Your Honor. One reason is that the lawyers with whom I work on this case, [inaudible] have handled several claims and have brought them.

JUSTICE NATHAN L. HECHT: But there's several around the state and it just seems after the giant has been asleep for so many years, it's suddenly awakened.

ATTORNEY BYRON KEELING: Well I don't know why necessarily the fact that there have been from my count five recent bad faith cases, two of which were resolved in favor of the employee and three of which were resolved in favor of the carrier that that necessarily foreshadows a bad trend. Aranda is. It exists. It is the law and certainly if an injured claimant meets the requirements of Aranda, that being the current state of the law, the claimant is perfectly free to pursue claims based on the remedies that this Court has afforded.

JUSTICE PHIL JOHNSON: Counsel, your time is up and, Chief, may I ask one more question?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, Justice Johnson.

JUSTICE PHIL JOHNSON: Opposing counsel said the DTPA claim that was in the trial court's judgment mentioned in the Court of Appeals' opinion was folded into the insurance code claim. Do you agree with that?

ATTORNEY BYRON KEELING: That's correct, Your Honor. Thank you very much.

REBUTTAL ARGUMENT OF PETER M. SCHENKKAN ON BEHALF OF PETITIONER

ATTORNEY PETER SCHENKKAN: Justice Johnson asked good questions and didn't get correct answers to how come there was six months delay here. The answer is that the carrier disputed compensability on July 12 and the work-

er, though represented by counsel, did not take the first step of requesting a benefit review conference until October 26, 3-1/2 of the six months of the delay for which they sue for bad faith causing additional physical impairment, pain and suffering and mental anguish and that is precisely what the problem is with opposing counsel's argument both on the cause of action and on Fage exhaustion. If a worker can exhaust administrative remedies by delaying starting to ask for them, then get an agreement by the carrier that it's not going to continue the dispute, an agreement that does not say but you did need hernia surgery back at the time I disputed the compensability of your injury and have that be a predicate for bad faith, we had seriously undercut the remedies of the labor code for no good reason and we have given an incentive to people and I do not say this is applicable to the facts of this case, but we have created an incentive for which other workers and lawyers who may be unscrupulous would choose to lay behind the law so that, especially if they're not hurting that severely.
JUSTICE DAVID M. MEDINA: So what do we do about unscrupulous claims adjustor?

ATTORNEY PETER SCHENKKAN: In the unscrupulous claims adjustor has no incentive to be unscrupulous and risk a personal liability as well as his company's liability.

JUSTICE DAVID M. MEDINA: But under your great case scenario, that would never happen and obviously it does happen probably more often than we know.

ATTORNEY PETER SCHENKKAN: Well, we don't think so in the workers compensation area and certainly none of the reported appellate cases review the facts of each of them.

JUSTICE DAVID M. MEDINA: Well I want to disagree.

JUSTICE PHIL JOHNSON: Well assuming you have an unscrupulous adjustor and assuming you have absolute bad faith and the carrier is just going to deny it, you have a claim that's been made and the workers compensation division has a record of that and can the carrier just forget about the claim or is something going to happen if the employee has a claim that's just ignored.

ATTORNEY PETER SCHENKKAN: If the carrier does not do a timely dispute, the carrier has to pay. If the carrier does timely dispute, then the worker has to take the initiative to invoke one of the commission's remedies and if it is a matter for which immediate relief is required, for that kind of a remedy and that's exactly what did not happen here.

JUSTICE PHIL JOHNSON: So if we do, if Justice Medina's question is you have an unscrupulous adjustor and a bad faith carrier and they deny it and the worker says well there's nothing I can do about it. I'm going to let it go. Then that just is lost in the system once there's a notice of claim given?

ATTORNEY PETER SCHENKKAN: There has to be a notice of dispute by the, per-

haps I'm not understanding the question correctly.

JUSTICE PHIL JOHNSON: Well the employee says I'm hurt. Turns in a notice of claim.

ATTORNEY PETER SCHENKKAN: Right.

JUSTICE PHIL JOHNSON: And the carrier says we dispute that and nothing happens. The employee either gives up or the employee says well maybe I wasn't hurt after all and forget about it. You have a notice of claim. You have a notice of dispute. Does that end it?

ATTORNEY PETER SCHENKKAN: Yes. It ends it.

JUSTICE PHIL JOHNSON: [inaudible] doesn't follow up.

ATTORNEY PETER SCHENKKAN: It ends it if the worker does not take the next step. That is the worker's burden under the system and it is not an unreasonable or unfair one and it is one under which there is no incentive for the unscrupulous insurer to make him take that first step if there's not some good faith basis for it. The argument for, I'm sorry, Justice Guzman.

JUSTICE EVA GUZMAN: It could be an incompetent adjustor and I think at least in some of these cases, it was the same adjustor handling the files, if I recall correctly from my Court of Appeals days. Didn't we have the same adjustor in some of these cases?

ATTORNEY PETER SCHENKKAN: I'm not sure what you're referring to. Certainly, there are a limited number of adjustors in a given city and in Houston and there may be.

JUSTICE EVA GUZMAN: And so the incentive for the company would be we have an incompetent adjustor who denies claim. No one does anything. That's good for us. We're not paying on the claims.

ATTORNEY PETER SCHENKKAN: But if, in fact, it's improperly denied and it is causing the problem, the worker has immediate remedies of the commission at the division of workers compensation, ones that will address that problem and the carrier's liability to the commission, to the division is not limited to bad faith, but includes failure to process claims properly in a prudent and reasonable manner, that's in the labor code.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Schenkkan. The cause is submitted. That concludes the arguments for this morning and the Marhsal will now adjourn the Court.

MARSHAL: All rise.

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