

ORAL ARGUMENT - 11/28/95
95-0379
CONTINENTAL CASUALTY V. FLORES

LOVELL: May it please the court. Before you are two judgments awarding worker's compensation benefits, which were obtained through fraud by the respondent, Mr. Flores. That has been so adjudicated. Yet in spite of that Mr. Flores has since early 1990 and continues to this day to receive those worker's compensation benefits.

I represent Palo Duro Meat Processing in this appeal, who is the employer and the judgment creditor in the fraud case.

SPECTOR: Is it your position that he was never injured while he worked for Palo Duro?

LOVELL: No, your honor. In fact he was injured after they became a nonsubscriber in Dec. 1989. And Palo Duro Meat as a nonsubscriber paid for the medical. He had surgery for some hernias that developed at that time, paid for the medical, and paid him on the job injury pay during that period of time. And yet now he has recovered for these same injuries having alleged that they occurred 1 year earlier.

CORNYN: Why haven't you been made whole by the judgment you obtained against Mr. Flores?

LOVELL: The judgment awards damages, which Palo Duro is unable to collect or more specifically garnish because of the statutory prohibition against garnishment of worker's compensation benefits.

CORNYN: Ordinarily the law says you get a right to a remedy it doesn't necessarily say you can collect your judgment. Why should this be any different?

LOVELL: The point here really not so much whether or not Palo Duro can collect the judgment. It's whether or not the law allows an award of worker's compensation benefits that are obtained through fraud and having been so adjudicated.

CORNYN: If you are right what happens to the \$150,000 judgment that you've obtained against Mr. Flores? Is that a nullity?

LOVELL: Not necessarily. It would raise a question which Mr. Flores would be entitled to pursue with respect to a credit on the judgment to the extent that then flows back to Palo Duro. He would certainly be entitled to a credit on the judgment.

GONZALEZ: Counsel we assume for the sake of argument that the TC committed error in striking Palo Duro's intervention. At this stage of the proceedings, or given the posture of the cases what is the relief that is possible?

LOVELL: The relief to Palo Duro, as a benefit to Palo Duro is in effect a credit on the judgment going back to your original point. Because the way the facts come down here this worker's compensation policy was what's called a retro policy, and the net effect of that is that Palo Duro pays \$1.16 for every dollar that worker's compensation carrier pays out. And also pays for any amount reserved. So that if the benefits are stopped or repaid, then that does affect a flow-back recovery to Palo Duro.

GONZALEZ: Walk me through it. How does it work. We've got two judgments. You obtained a judgment for fraud; they've obtained a judgment for benefits. Procedurally where do we go from here assuming that there was an error in striking the intervention?

LOVELL: Well procedurally how you go from here really we are going the wrong path if we are concerned on how Palo Duro recovers. It goes the other way around. If procedurally the TC and the CA erred, then what you do is reverse and render the worker's compensation judgment. Because he is not entitled legally to recover worker's compensation benefits obtained by fraud. Now the effect that ultimately has on Palo Duro outside a judicial decision is that that then...the insurance carrier has to retrospectively then readjust the premium, which would be a credit on our judgment.

BAKER: How do you get a rendition for Palo Duro when you weren't a party to the litigation involving the worker's comp claim?

LOVELL: We were a party through intervention.

BAKER: But you were knocked out, and now there's a judgment. How can we render under those circumstances?

LOVELL: Technically speaking under normal circumstance in reversing you would remand back to the TC. The difference here is that the only thing the TC could do then is to render judgment that Mr. Flores take nothing, because as a matter of law, as a result of the fraud judgment he cannot recover under the worker's compensation.

BAKER: But we can't do that, that's what you said?

LOVELL: Well I think you can because there is nothing for the TC to do other than to render that judgment. You can also reverse remand to the TC, the net effect being the same that the TC would have to render judgment...take nothing judgment on the worker's compensation.

ENOCH: Is it uncontested...I mean is there any dispute in this case that if an employee lies on an employment application and becomes an employee of the company, and they then thereafter are injured on the job, that they are not entitled to compensation? Is that clearly accepted by all the parties here, that Mr. Flores' fraud in obtaining the employment unquestionably bars his recovery under comp?

LOVELL: That's hotly disputed.

ENOCH: And so in your argument aren't you assuming, aren't you making the assumption that this court has to conclude in the first instance that lying on the employment application bars comp coverage?

LOVELL: No, it's not quite that simple. In the first place there's a lot more to it here than just simply lying on the employment application. And frankly we will admit that just simply lying on the employment application does not by itself bar worker's compensation recovery.

ENOCH: Well let me be more accurate. You have someone who substitutes for you at the physical that's necessary to get the employment. You are saying that bars comp coverage?

LOVELL: With the causal connection between that and the injury yes your honor. Under the US SC case, the Rock case, which is the only other case we can find anywhere in the country with these facts.

OWEN: And what finding do you have in the record that establishes that causal connection that would be binding on Flores?

LOVELL: If I understand your question, the finding that he committed fraud not only in obtaining employment, but also in making 2 worker's compensation claims, that verdict and the judgment that rests on that verdict is what then results in that. Now it is undisputed that Mr. Flores did have an imposter standing to take his preemployment physical.

OWEN: You conceded there has to be a causal connection. And I am saying where is the finding in the record that we could render on that would establish the causal connection you concede is necessary in the US SC decisions?

LOVELL: In the jury verdict.

OWEN: And specifically what finding?

LOVELL: About the back, that he had the back injury that caused disability. Further in the record Mr. Flores' own expert, Dr. Albright, a chiropractor, testified that he had seen Mr. Flores several years before Mr. Flores ever came to work for Palo Duro for another worker's comp injury. At that time he found that Mr. Flores had the congenital malformation in his back, and the grade 1 spondylolisthesis.

OWEN: But that would be a fact issue unless you have a finding that's binding as to Flores, correct? You are talking about evidence. I am talking about what specific findings do you say that are binding on Flores that would justify us rendering?

LOVELL: The finding of the back injury.

PHILLIPS: So a lot of your case at the TC and the briefs up here it seemed to me expended great effort in trying to convince us that Mr. Flores in fact had no injury at all. But what you are saying is because you lost that you have a finding that is a causal connection that allows a rendition of judgment that Flores take nothing?

LOVELL: We are not saying he has no injury at all. We are saying he did not suffer a back injury in the course and scope of his employment at Palo Duro. What he does have...

PHILLIPS: But you lost that. I think what you are telling Justice Owen is it's lucky you lost that. Because there was a finding that you lost that there is then a causal connection between his substituting someone for the physical and the injury he suffered, and that is a fraud that makes his employment contract an absolute nullity so that he is not eligible to recover comp?

LOVELL: No, not necessarily. I think maybe where we are getting off is whether or not it's disputed what his condition was and what he was seeking compensation for.

HECHT: The question really is: What is the causal connection between the fraud and the worker's comp claim? And your answer is: The answers by the jury to question 1 and 2 in the fraud cause, or not?

LOVELL: Well, yes, combined with the answers in the verdict in the back case.

HECHT: That it wasn't because of some prior circumstance?

LOVELL: Right. There is something else that's tied into this and it gets pretty complex, but the worker's comp carrier also sought to have the contribution issue as part of the back case, which was denied.

ENOCH: I am a little bit confused. The comp carrier can argue pre-existing conditions? Can't the comp carrier in this lawsuit could they not have done that?

LOVELL: Yes sir.

ENOCH: And could they not have argued in the comp case they could have argued the issues about previous injury, or that this was not an injury, that he wasn't injured at the time he made the claim? They could have argued the fraud in the procurement of the comp coverage couldn't they?

LOVELL: Yes, sir.

ENOCH: And you agree there is case law out there that says: Merely fraud in obtaining employment does not necessarily vitiate comp coverage; correct?

LOVELL: That's right.

ENOCH: And the argument that Flores is making here is the fraud findings in the fraud case are not tied to the specific facts that would otherwise entitle the comp carrier to claim it doesn't owe comp? In other words the only fraud you have is in obtaining employment?

LOVELL: No. We've got a finding he not only committed fraud in obtaining employment but that he committed fraud in making the worker's comp back claim, and he committed fraud in making a worker's comp hernia claim.

ENOCH: And the jury found there was fraud in making the back claim?

LOVELL: Yes sir.

ENOCH: But there was not fraud in making the hernia claim?

LOVELL: No, they found there was fraud in making both worker's comp claim. In the jury verdict those were separated. There was 3 separate questions for the jury to decide.

Fraud in obtaining employment? They checked yes.
Fraud in making the back claim? They checked yes.
Fraud in making the worker's comp claim? They checked yes.

CORNYN: And that was because he was not in fact injured, or because he would not have been in a position to have been injured if he had actually stood in for his own pre-employment physical?

LOVELL: The real difference was the evidence that was allowed in in the fraud trial that was not allowed in in the comp trial regarding Mr. Flores' own motive, which he stated the reason he was doing what he was doing, and the reason he didn't want to work was because he made more money through his disability benefits on the job injury than he did when he worked. That's the critical factual distinction between the evidence in the fraud case, and the evidence in the worker's comp cases.

OWEN: Again, you are talking about the evidence. What specific finding can we turn to

that would establish the causal that you concede is necessary between fraud in the employment, and that that was the cause of the injury?

LOVELL: There isn't a specific jury finding that specific. It was never disputed that there is a connection between a pre-existing condition he had, and the ultimate injury he had. But there is not a specific jury finding that there was a causal connection...well other than the jury finding in the fraud case I suppose that the fraud approximately caused the damage to Palo Duro.

We respectfully request the court to reverse.

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LAWYER May it please the court. The question No. 1 in the fraud case as counselor stated had specifically submitted 3 issues. It said:

Did Miguel Flores commit fraud against Palo Duro with regard to any of the following: A) obtaining employment; B) worker's comp claim for back injury; C) worker's comp claim for hernia?

And the jury answered Yes to all 3.

One of the questions, the primary question is whether or not this constitutes collateral estoppel because the judgment in the fraud case was rendered on the same date as the judgment in the 2 judgments in the worker's comp cases. We would refer the court to this court's recent decision in a combined appeal: Thomas(?) v. Sulivann(?); and Gibson v. Spinks, 895 S.W.2d 352. This was not specifically a collateral estoppel case, but involved...essentially it is a collateral estoppel issue: §1.106 of the Gov't Code where a judgment in favor of the entity will preclude a judgment against the employee. And those were rendered on the same day. And the court held that that did knock out a claim against the employee.

CORNYN: Counsel may I ask you why didn't Continental plead and try the fraud in obtaining the employment in the worker's comp cases?

SAUSEDA: It was not pled originally, but it was pled subsequently.

CORNYN: By Continental or by Palo Duro?

SAUSEDA: Well it was pled by Palo Duro, and it was also pled by Continental in its motion for new trial in its appeal. It was not pled originally as a defense.

CORNYN: If it wasn't pled by Continental in the comp case until the motion for new trial wouldn't it be waived insofar as Continental is concerned?

SAUSEDA: It is our position that it is undisputed. And whether it was pled or not it precludes a judgment as a matter of law, and the employer was a party to the suit and at that time raised the issue.

HECHT: Could Continental take an assignment of Palo Duro's judgment and offset that against the benefits?

SAUSEDA: I wouldn't see how your honor.

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RESPONDENT

SAUSEDA: Your honors I want to first tell you guys this was my first trial. I should kill my partners for putting me up here in this position. Nevertheless, let me start by giving the court an analogy if I can gather from the questions that are being asked.

If we had a couple of individuals that suffered injury in a hiking accident, and that person that got hurt didn't have insurance coverage. But the man that didn't get hurt did have insurance coverage, and he submitted his card at the hospital in order for the first person that got injured to receive medical treatment. And by those means he got admitted to the hospital. In the process of receiving treatment, the person that got hurt loses a vital organ through the negligence of a medical practitioner that's doing the service on him. Would that prevent the fraud in this man?

There is no question that there was fraud committed in the process of him receiving medical treatment, and that the carrier would probably have an action against him for having paid those benefits to the hospital on a person that wasn't insured. By doing that would that relieve the medical practitioner from his negligence? That's exactly what we have here. There's no question that Mr. Flores had an imposter or stand-in, whatever you want to call him come in and take his pre-employment physical. Not because he couldn't do the job, but because Palo Duro insisted that x-rays be taken. And in these x-rays he already knew that a congenital deformity would show up. So he obtains his employment by these means: by having someone else take his preemployment physical. He works 3 years at this meat packing plant - a very strenuous job. For 3 years. And then as things would have it he hurts himself.

GONZALEZ: The jury found that he wasn't hurt. The jury found that the claim for the back injury was fraudulent.

SAUSEDA: The jury in the worker's comp cases found that he had on-the-job injuries that were legitimate injuries, and for which compensation should come. I mean inherent in all the arguments that the carrier made at the court is whether these were even injuries to begin with. The jury came back with favorable findings on 1 hernia, and on a back claim.

PHILLIPS: How could these two claims possibly be tried in separate trials, and expect to come up with some result that makes sense as a whole? I am asking how come the trial judge did not abuse its discretion in severing the defense from the claim in essence?

SAUSEDA: I would state to the court that the words of the judge in severing these at the last minute again was that he couldn't possibly think of a worse nightmare in trying to try these cases together and being able to put one hat on for Flores as a plaintiff in one case, take that hat off and put it on his head as a defendant, and then be able to tell the jury: You can consider this evidence for this case, but you can't consider the evidence for this case.

CORNYN: The only worse nightmare is trying to make some sense out of it on appeal I guess?

SAUSEDA: Well your honor you can see from what's on my desk I have been trying to make some sense of the case on appeal myself. There is no question that the man got a job by some means other than he should have. There is no question about that.

HECHT: Well to put a little finer point on it though, the jury found that he committed fraud with respect to the 2 comp claims, not just with respect to the employment?

SAUSEDA: You know there is no record up here on just what the issues were that the jury considered your honor. I mean what's the fraud? We had 3 different allegations of back injuries. This says: Worker's Comp claim for back injury. What back injury? Was it fraud in not crossing a T, or dotting an I? Was it fraud in obtaining his employment and then not representing or telling that to the medical providers when he received medical attention for that? What fraud are we talking about? There is nothing in the record to identify for me and to identify for you as Justices what the issues were.

OWEN: Does that mean that we have a fact question in whether there is a causal relationship between the initial fraud and the back injury?

SAUSEDA: I would say you would never get that your honor because that issue inherently was tried in the worker's comp case and wouldn't be subject to relitigation.

OWEN: It's not binding as to Palo Duro is it because Palo Duro is not a party to that litigation?

SAUSEDA: Why wouldn't it be binding to Palo Duro if they are in privity to their carrier. I mean their carrier is there for the sole purpose of defending them and presenting any actions they could bring on their part. I mean it's a contractual deal. It should apply just as well to Palo Duro as it would to anyone else that's in privity to that contract.

PHILLIPS: You are saying that the fraud defense was raised and tried by Continental in the comp case?

SAUSEDA: Your honor what I am saying is that the jury was made aware...

PHILLIPS: Are you saying it's tried by consent, because I thought in your brief you were saying it was not pled and was not tried?

SAUSEDA: Let me phrase it this way your honor. And I apologize if I am not understanding your question. It was inherent in the proceedings of the worker's comp case that you had to present evidence that you had injuries and that those injuries weren't fraudulent. I mean if this man...for example let's take the back case. Let's say that in the trial of the worker's comp cases the carrier had evidence that he hurt his back playing soccer somewhere. It was their duty to bring that out and say this injury is not work related and therefore it is not compensable.

CORNYN: Isn't the point though that Mr. Flores would not have been employed at Palo Duro if he had stood in for his own preemployment physical?

SAUSEDA: I think that's a fact issue from everything that I know about what went on in the fraud case your honor because...

CORNYN: That's a fact issue?

SAUSEDA: Yes. There was a submission in the fraud case as to when the carrier reasonably had information to ascertain that fraud had been committed in the obtaining of employment, and they chose to do nothing. That issue came back as being some date prior to this person being dismissed from his job there for totally unrelated reasons. So my question is these guys acquiesce having him as an employee even after the fact that they became aware that he had committed fraud in obtaining employment.

GONZALEZ: What is the status of the worker's comp judgment? He's been paid and he got a

lump sum settlement?

SAUSEDA: Your honor the status of the worker's comp cases are in limbo with respect to the hernias. He's been receiving TTD (Total and Temporary Disability) payments on the back since the inception of that injury. So he continues to receive those benefits for the back injury. There hasn't been a resolution of any of the hernia monetary sums.

ENOCH: If the fraud claim had been tried in the same lawsuit and you had a jury that came back and found there was fraud in the back comp claim, and a finding of an on-the-job injury, how would you reconcile those two findings, or can you reconcile the findings?

SAUSEDA: That's a good question your honor. Again not knowing what issues were presented to the jury with respect to what fraud...I mean fraud encompasses all sorts of things as far as the information that could have been presented to the jury. If your specific question is that...

ENOCH: Let's assume that the congenital back condition contributed to the injury that occurred on the job. So you've got this causal link. The congenital back injury contributed to the injury that occurred on the job. And he had a stand-in that got him the job. So the jury comes back and that's all the evidence. The jury comes back and says we've got an on-the-job...we have an injury, it occurs on the job, and it's total and permanent or whatever this finding was. And the judge also submits a question: Do you think there was fraud in making the comp claim for the back injury? And the jury answers: Yes. Now are those in conflict first, and if they are not in conflict then what would the judgment be in the case?

SAUSEDA: I don't know the answer to that. I wish I was that quick of a thinker on my feet. There would definitely have to be a conflict your honor because if there is a finding that they were on-the-job injuries, inherent as that is that they are compensable injuries and the only way they can be compensable injuries is if they weren't fraudulent injuries.

ENOCH: Is it a defense to a comp claim by the carrier that the person made a misrepresentation about a preexisting condition that contributed to the injury? Can a comp carrier avoid its responsibility under the comp provisions by an employee who is injured on the job, and is otherwise covered by comp, that they misrepresented a preexisting condition that got them the employment and that preexisting condition contributed to the injury? Can a comp carrier avoid its obligations under that fact case?

SAUSEDA: From the cases that we've cited in our briefs both here and at the CA I would say the answer to that is no. It can't avoid its obligations under the contract for obligations to pay for compensable injury. Again there would have to be a finding of the compensable injury. There is no question that a preexisting condition can come in to defeat that or to reduce it. But the misrepresentation of a preexisting condition wouldn't void the benefits. I mean wouldn't void the contract or the obligation of the carrier to pay for on-the-job injuries.

The only case that is cited for the court that even comes close to that is the case that's been very limited to its facts is the _____ case dealing with FELA law, which has totally different public policy applications as the SC in those cases has limited that to.

OWEN: What are those different public policy _____?

SAUSEDA: Interstate commerce was the issue that they hung their hat on. This has nothing to do with interstate commerce.

CORNYN: You don't dispute do you that Palo Duro had the right not to hire Mr. Flores if in fact he could not pass a preemployment physical do you?

SAUSEDA: Not at all your honor.

CORNYN: And so if he fraudulently induced them to hire him why doesn't that vitiate all of his claims under the worker's comp cases?

SAUSEDA: Because that's clearly not the law. The law clearly states that it's only his employment that's voidable, and they chose not to do that even by the issues that were presented in their fraud case.

CORNYN: So there is nothing an employee can do in obtaining employment that would ever jeopardize their right to recover for on-the-job injuries?

SAUSEDA: For worker's injuries under the old comp statute my answer to that there is nothing that the employee could have done in the representation for obtaining employment that would negate his right to receive compensation for legitimate on-the-job injuries. The public policy if thrown back to the court is this: this man worked for 3 years; was very productive for this company. That's the own testimony of the employer. Does he get that money back because it was a voidable contract of employment? You know you are going to get into a bunch of other issues that really don't need to be there. The fact is did he get hurt? And were those legitimate injuries, were they compensable? what defenses did the carrier have that they chose not to present? what information did the carrier have to convince a jury of 6 or 12 people that these weren't legitimate injuries, and chose not to bring forth?

OWEN: What defenses do you think the carrier had that they did not assert in this case?

SAUSEDA: Well the defense they had, your honor they had the perfect defense to say these were fraudulent injuries, that these never occurred on the job. They had to defend those. Just because I, as an attorney, or Mr. Flores as a human being an employee for a meat packing plant comes in and says I got hurt doesn't prevent the carrier from saying: "Hey here is my foreman, here's my supervisor, here's his co-worker; he never got hurt on the job; let me tell you where he did get hurt." If they had that evidence, and chose not to present it, it's not my fault. That would have been a defense. The defense would be that these aren't injuries that occurred in the work place.

HIGHTOWER: Counsel the nature though of his injuries were...they came about because he had this congenital condition. Had he not had that these particular injuries perhaps might not have occurred; isn't that correct?

SAUSEDA: I will agree with you on one part your honor. The hernias had nothing to do with the congenital back injury. And there is abundant testimony that he had separate injuries to his spinal column that had nothing to do where the congenital deformity was. There is testimony that his injuries or his work there aggravated that preexisting condition. Yes, I will got that far.

HIGHTOWER: It's a different case here than it would have been had his injury been: something fell on his foot, and his foot was injured. That would be a completely different thing. But this case involves the back. And the company would have the right to anticipate that someone that had that condition might be injured because of that condition; isn't that true?

SAUSEDA: Well you know your honor now under the American Disabilities Act that's not even a question that can be asked to these people. The only thing that the employer can do now is physically

ask them whether they are capable of doing the work. This man was physically capable of doing his work.

HIGHTOWER: You mean the x-ray was unnecessary and could not have been considered by the employer because of the ADA?

SAUSEDA: I think the x-rays now couldn't be considered in denying him employment on the basis that that x-ray would show as a matter of law that he couldn't carry on his physical activities. He passed his physical examination.

HIGHTOWER: Oh no, no he didn't pass it.

SAUSEDA: He didn't pass his preemployment.

HIGHTOWER: He didn't pass it because his physical examination included the x-rays.

SAUSEDA: His preemployment physical had as a prerequisite an x-ray.

HIGHTOWER: That's right so that was part of it then wasn't it?

SAUSEDA: That was part of his employment. I see where you are going. He didn't pass his preemployment physical.

PHILLIPS: It seems to me that a few minutes ago you admitted that his prior injuries may have in some sense led to this injury, or aggravated this injury. If that's the case didn't the trial court err in the comp case in not submitting an issue to the jury on preexisting condition?

SAUSEDA: Your honor let me clarify. I don't know that I admitted that his prior injuries. What I said was that if he had a preexisting condition, that preexisting condition may have been aggravated by his on-the-job injuries. Is that the same question?

PHILLIPS: I think that's the same. Either way you look at it under the comp law wasn't there enough evidence raised that the trial judge should have allowed the jury to make a reduction in its award because of that other condition?

SAUSEDA: I don't think there was any testimony in the proceedings your honor whether any preexisting condition contributed to this man's incapacity.

PHILLIPS: Are you saying there was no testimony, or just didn't have the requisite degree of expertise attached to it?

SAUSEDA: Well one of them you didn't have the requisite degree of expertise. I mean there wasn't any doctor or evidence produced from a medical provider that came in and said the contribution that this man has now is some way affected or reduced by the preexisting condition.

PHILLIPS: Is that necessary under the law?

SAUSEDA: Well I think under the cases that we have cited it's absolutely necessary that you have some evidence presented to the jury to be able to differentiate between the incapacities if there is any.

HECHT: Do you know of a reason why Palo Duro can't assign its judgment to Continental and Continental set it off against the benefits of the _____?

SAUSEDA: Your honor it is my belief that in what we've cited also that the worker's comp statute prior to Jan. 1, 1991, didn't allow for garnishment of those type of benefits.

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REBUTTAL

LOVELL: The reason we have this problem other than of course the conduct of Mr. Flores is because we have one set of circumstances which was unnaturally and we say erroneously divided into two trials. The reason we have a conflict is because the worker's comp jury was not allowed to decide on the fraud. They were not allowed to hear all the evidence concerning the fraud. Specifically you can look to the record in the statement of facts between pages 337, and 353 where Mr. Wade who was trying the case on behalf of the comp carrier was attempting to get before the jury the full range of facts regarding Mr. Flores' fraud in making the worker's comp claims. That was denied; it was kept out. It was allowed in however in the 2nd case.

ENOCH: When you are talking about fraud in making the comp claims I was not clear in the briefs what we were talking about here. You seem to now be arguing that the fraud was in making a claim for back injury that did not occur; is that your point?

KUHNE: That's one of the points.

ENOCH: And you're saying the trial court in the insurance case would not permit evidence that there was a fraudulent notice of claim, that basically he was not injured on the job, that he would not permit that evidence in in the insurance case?

KUHNE: That's true.

ENOCH: And the insurance company tried to get that evidence in?

KUHNE: Yes, your honor.

ENOCH: Is that issue before us? I mean did the comp carrier being an issue here that the trial court erred in keeping out evidence that the injury was not incurred on the job?

KUHNE: Not structured as a point of error on exclusion of evidence.

ENOCH: Well is that finding of that jury now before us for review?

KUHNE: The finding of the work comp jury?

ENOCH: Yes, the finding of the comp jury before us determining that it was an injury on-the-job is before us saying that the court erred in not allowing evidence in that case.

KUHNE: I don't believe from an evidentiary standpoint.

ENOCH: I will ask you the same question I asked Mr. Sauseda. Let's assume that this case was tried together. You had the jury find that there was fraud in the back claim; and you had the jury find there was an on-the-job injury. Is that a conflict, or not a conflict?

KUHNE: No, if they would have found that, that would have been a conflict which would be resolved - should be resolved.

ENOCH: Then what should the resolution be? Taking all the evidence you say of fraud, and taking all the evidence of their claim that there was an injury on-the-job; how would you resolve the conflict?

KUHNE: By having allowed the intervention. That's the distinction. And that's where the problem started is that the intervention was improperly not allowed. And it became more complicated frankly because earlier on..

ENOCH: Is your answer that it doesn't result in a rendition it actually results in a remand for a new trial?

KUHNE: At the trial court had they been tried together?

ENOCH: No. Your argument is that the real problem here is because there was a separation of these two cases it needs to go back to new trial. You see that the answers the jury gave are in fact a conflict. One is not controlling over the other. They are simply conflicting and needs to be tried together?

KUHNE: Well no it doesn't need to be tried anymore, because fraud...that was tried. That's what was tried in the fraud case. It's now been found and adjudicated. That issue was. It was not allowed in however in the worker's comp case. And that's the reason we end up with a conflict. And that's why we should have been allowed to intervene. It was complicated further because we were consolidated. And up until the day of trial we were supposed to have a consolidated trial.

ENOCH: But the finding of the jury that there was an on-the-job injury is in conflict with a finding that there was fraud in making the back claim. That's a conflict?

KUHNE: Absolutely.

ENOCH: And those are two jury findings?

KUHNE: That's right. Having been separated in trial if we would have had one trial with the question: Did he commit fraud...well allowing evidence in the first place of when his injury was, and the reasons and motive behind it.

ENOCH: You say that we should accept the finding in the fraud case as being more significant than the finding in the comp case because the evidence was presented in the fraud case?

KUHNE: Well here because of the way things came down, that ends up estopping the findings in the worker's comp case because it was fully litigated there, and all the parties were there.

ENOCH: Then Mr. Sauseda says though: We don't have a complete record of the fraud case to show what the evidence was that that finding was based on.

KUHNE: Not a complete record. I wouldn't state a complete record. You have a sufficient record to find that. It is incorrect that you don't have a record to establish what the issues were to support collateral estoppel because before the court in the record you had not only the verdict - the fraud verdict, the fraud judgment, there is also the pleadings of the parties in the fraud case together with most of the exhibits in the fraud case and excerpts from the testimony in the fraud case. You have everything you need in the record. The trial court had everything he needed in the record to then apply those findings, which are found in the fraud case and prevent a wrongful recovery of worker's compensation benefits.

HECHT: Is it true that there is nothing you can do to get back what's already been paid in benefits?

KUHNE: I believe that's right your honor.

HECHT: And the benefits yet to be paid are \$180 per week which stop on May 6, 1997?

KUHNE: If you've calculated it.

HECHT: I think that's from your brief.

OWEN: Did your comp carrier raise fraud in the back case?

KUHNE: In the pleadings no, not until the motion for new trial.

OWEN: Why isn't their failure to raise that binding on you?

KUHNE: Because we weren't a party to that case.

OWEN: But isn't your comp carrier there to defend your interest on the comp issue?

KUHNE: No, we are precluded from being a party to that and the policy and the statute itself makes the comp carrier the party and the comp carrier so reliable, so the comp carrier is only there taking care of the comp carrier.