IN THE SUPREME COURT OF TEXAS

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NO. 98-1046

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NATIONAL LIABILITY AND FIRE INSURANCE COMPANY, PETITIONER

v.

DONALD ALLEN, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

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Argued on September 22, 1999

JUSTICE OWEN, joined by JUSTICE HECHT, dissenting.

The opinion issued February 3, 2000 is withdrawn, and the following opinion is substituted.

I would hold that testimony given at a workers' compensation contested case hearing is admissible in a later modified de novo review in district court even if the witness is not shown to be unavailable. I do not believe that the Court has given effect to legislative intent in construing section 410.306(b) of the Labor Code. The trial court's refusal to admit the testimony at issue was harmful error, and I would reverse the judgment of the court of appeals and remand this case to the trial court. Accordingly, I dissent.

Donald Allen contends that he suffered a work-related injury and that he timely notified his employer. National Liability, his workers' compensation carrier, disputes that notice was timely. At the contested case hearing, Allen testified that while he was in the hospital immediately after his

injury, he told his superintendent, Angers, that his injury arose out of his work. National then called Angers as a witness, and he testified that he did not recall such a statement by Allen. The hearing examiner concluded that notice was not timely given, and the Commission's Appeals Panel affirmed that decision.

Allen sought review of this adverse determination in district court in accordance with the Texas Labor Code. He chose to have a jury decide the sole issue in dispute, which was notice. At trial, National sought to introduce the testimony that Angers had given at the contested case hearing. National did not, however, show that Angers was unavailable to appear at the district court proceedings. The trial court excluded the testimony, relying on Rule 804 of the Texas Rules of Evidence. Thus, although the jury was told that the Appeals Panel had found that Allen had not timely given notice, the jury heard no evidence to that effect.

Until the amendments to the Labor Code in 1989, an appeal to a district court was de novo. *See Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 512 (Tex. 1995) (quoting Tex. Rev. Civ. Stat. Ann. art. 8307 § 10 (repealed by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01(10))). The Industrial Accident Board's award was inadmissible. *See id*. Testimony presented to the Board was considered hearsay in subsequent court proceedings and was inadmissible unless an exception to the hearsay rule applied. *See, e.g.*, *Texas Gen. Indem. Co. v. Scott*, 253 S.W.2d 651, 655 (Tex. 1952). The Legislature revamped the entire workers' compensation scheme in 1989. As part of that comprehensive revision, the Legislature devised a modified de novo review procedure and directed that when contested fact issues are to be decided by a jury, not only must the jury be told "of the commission appeals panel decision on each disputed issue" that the jury is asked

to decide, TEX. LAB. CODE § 410.304(a), but that "[a]ll facts and evidence the record [in the Commission] contains are admissible to the extent allowed under the Texas Rules of Civil Evidence." *Id*. § 410.306(b). This was meant to be a significant change from prior law.

The meaning of section 410.306(b) allowing "[a]ll facts and evidence" to be considered in the district court proceedings becomes clear when it is considered with the entirety of section 410.306, which says:

> § 410.306. Evidence
>
> (a) Evidence shall be adduced as in other civil trials.
>
> (b) The commission on payment of a reasonable fee shall make available to the parties a certified copy of the commission's record. All facts and evidence the record contains are admissible to the extent allowed under the Texas Rules of Civil Evidence.
>
> (c) Except as provided by Section 410.307, evidence of extent of impairment shall be limited to that presented to the commission. The court or jury, in its determination of the extent of impairment, shall adopt one of the impairment ratings under Subchapter G, Chapter 408.

Id. § 410.306.

Thus, the Code provides in subsection (a) that in the district court proceedings, "[e]vidence shall be adduced as in other civil cases." *Id*. § 410.306(a). Without subsection (b), this would mean that none of the testimony given at a contested case hearing would be admitted over an objection unless the witness was unavailable or another exception to the hearsay rule applied. What then would subsection (b) add if it meant nothing other than what (a) already provides? Such superfluity is contrary to established rules of construction. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).

The Court's construction of subsection (b) largely eviscerates its value because it leads to the result that proceedings at the trial court cannot be streamlined if a party insists on unavailability of witnesses as a prerequisite to admission of testimony at the contested case hearing. Rather than minimize the duration and cost of a court's review of a Commission decision by allowing the statutorily prescribed introduction of contested-case record evidence, the Court would require parties to recall witnesses. The Court's construction results in unnecessary expense and a hardship for those of limited means.

The Court's decision means that when a workers' compensation carrier challenges an impairment rating, the injured worker does not have the option of relying on the testimony of his experts at the contested case hearing. The worker must call each of his experts live in the district court proceedings unless the witness is unavailable. I do not believe that this was the intent of the Legislature.

I think that the Legislature had something else in mind. It seems clear from the directive that "[a]ll facts and evidence the record contains are admissible" that the Legislature wanted the court or jury in a review proceeding to have the benefit of that evidence without requiring the parties to repeat live for the factfinder everything that transpired before the Commission. Construing section 410.306 in that manner is reasonable and does not render subsection (b) redundant. If the facts or evidence in the Commission record would have been admissible under the Texas Rules of Evidence when offered at the contested hearing, then the facts or evidence may be considered in the district court proceedings. In other words, if evidence was objectionable and could have been excluded in

the Commission proceedings had the Texas Rules of Evidence applied, then objections to that evidence may be raised and sustained in subsequent court proceedings.

The Court posits that my construction of the statute would "force workers to hire attorneys to represent them in the Commission proceedings." __ S.W.3d at __. That is not the case. As I read the statute, there would be no greater need to protect the record at Commission hearings because specific objections to "facts and evidence the record contains" could be raised in subsequent court proceedings as contemplated by section 410.306(b). *See* TEX. LAB. CODE § 410.306(b) ("All facts and evidence the record contains are admissible to the extent allowed under the Texas Rules of Civil Evidence"). To the extent that a worker might benefit by having counsel cross-examine witnesses at the Commission hearing, a worker will always face the risk that a witness may be unavailable for subsequent court proceedings and that his or her testimony at the Commission hearing will be admitted in court.

The Court does not explain how it would rule if a witness becomes unavailable after the Commission hearing and the witness's prior testimony contains matters that could have been excluded had the Texas Rules of Evidence applied to Commission proceedings. If the Court is of the view that objections could *not* be raised in court if they were not raised at the Commission, then it would be more important for parties to have counsel at Commission proceedings. As noted above, I do not think that is what the Code contemplates. But, if the Court agrees with me that when a witness is unavailable, section 410.306 allows objections to be raised in court proceedings even if no objection was made at the Commission hearing, then the Court's construction of the Code would lead to what it says is "the anomalous and cumbersome result of trial courts having to retroactively

apply the evidentiary rules to evidence offered at the Commission to determine whether that evidence is admissible at trial." __ S.W.3d at __. The reasons the Court has given for rejecting my construction of section 410.306 are inconsistent with one another, and accordingly, it would seem that the Court has not carefully thought through its views about the statute.

The trial court's erroneous legal conclusion about the meaning of section 410.306 was an abuse of discretion. *See Huie v. DeShazo*, 922 S.W.2d 920, 927-28 (Tex. 1996). Because the exclusion of the testimony precluded the jury from considering the only testimony indicating that Allen did not give timely notice, the error was harmful. I would reverse the judgment of the court of appeals and remand this case to the trial court for further proceedings.

Priscilla R. Owen
Justice

OPINION DELIVERED: May 4, 2000