

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Daughters of Charity Health Services of Waco, A Texas Corporation D/B/A
Providence Health Center, Petitioner,
v.
Donald Linnstaedter and Kenneth Bolen, Respondents.
No. 05-0108.

February 14, 2006

Appearances:
Andy McSwain, Fulbright Winniford, P.C., Waco, for petitioner.
Derek Tod Gilliland, Williams Squires Wren Brown & Gilliland,
L.L.P., Waco, for respondents.

Before:

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

CONTENTS

ORAL ARGUMENT OF ANDY MCSWAIN ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF DEREK TOD GILLILAND ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF ANDY MCSWAIN ON BEHALF OF PETITIONER

COURT ATTENDANT #1: Oyez, oyez, oyez. The Honorable of the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is now sitting. God save the State of Texas and this Honorable of the Court.

JUSTICE #1: Thank you. Please be sited.

COURT ATTENDANT #2: Good morning. The Court has three matters on its oral submission docket and the order of their appearance they are: Docket No. 05-0108 Daughters of Charity Health Services of Waco versus Donald Linnstaedter and Kenneth Bolen from the McLennan County of the Tenth Court of Appeals District; Docket No. 05-0326 In Re D. Wilson Construction Company. An regional proceeding which have been consolidated with Docket No. 05-0327 American Standard and the Trane Company, et al. versus Brownsville Independent School District from Cameron County at 13th Court of Appeal District; and Docket No. 05-0832 Lamar Homes, Inc. versus Mid-Continent Casualty Company which is here on certified questions from the United States Court of Appeals with this Circuit. The Court has allotted 20 minutes per side in each of these arguments and the Court will take a brief recess to continue the arguments and the expect to include all of them before noon. These proceedings are being recorded and a link to the argument should be posted on the Court Website by the end of the day today. Court is now ready to hear argument in 05-0108 Daughters of Charity Health Services of Waco versus Donald Linnstaedter and Kenneth Bolen.

COURT ATTENDANT #3: May it please the Court. Mr. Andy McSwain represent argument of the petitioner. The petition for argument-- for ...

ORAL ARGUMENT OF ANDY MCSWAIN ON BEHALF OF THE PETITIONER

MR. MCSWAIN: Chief Justice, may it please the Court, opposing Counsel. My name is Andy McSwain. I represent Providence Hospital of Waco, Texas. A little over ten years ago, the respondents in this case, Mr. Linnstaedter and Mr. Bolen, presented themselves on this hospital Emergency Room with severe injuries followed by head on solution. They were treated; they were ultimately were list. It turns out that they were on the job when that solution took place. The Workers Comp. Carrier paid the providence hospital a little less in tax of this total of charges for their admission to the Emergency Room and hospital care and providence hospital file a hospital lien with respect to any potential claims against third parties that might have reason resolute that, that accident. After that, the respondents then became plaintiffs and they soon third party tortfeasor of John Paul Johns later I believe they proceeded against the state of John Paul Johns. As a part of the lawsuit, they may claims for the total bill of charges from Providence Hospital and the number should not lowers there's something on that proposal, something under-- over \$22,000 as of that point in time the Worker's Comp. Formation, I'm sorry, Worker's Comp. Carrier had paid something less than \$10,000, The Providence Hospital. Ultimately ...

JUSTICE: And why there was members argue there's no dispute and ...

MR. MCSWAIN: Whatever the members argue there's no dispute. There is in a great respect from the facts the member who've said that accurately to the Court of Appeals opinion. Ultimately, the respondents here the plaintiffs later, Linnstaedter and Bolen, settled their case against the third party tortfeasor, \$475, 000. Providence was paid the \$12,000 it was left remaining on its hospital lien, hospital lien prosecution. It released the hospital lien against the causes of action against the third party tortfeasor. Thereafter, Linnstaedter and Bolen became plaintiffs again and that stood Providence Hospital in the [inaudible] for declaration that its hospital lien was not really good because of Workers Comp. Act and obtain that declaration from the Trial Court and again from the Court of Appeals the amounts of money here are not large. What is it, it really it issued my mind is this is a case where we opt to look to a fair and just result and it is not a fair and just result for this two gentlemen to be of sued the third party tortfeasor.

JUSTICE #3: Well, let me ask you about that.

MR. MCSWAIN: Yes, Ma'am?

JUSTICE #3: You thought they have a windfall?

MR. MCSWAIN: Yes, Ma'am.

JUSTICE #3: But I don't see how that can be under the structure of the code because they're either going to give it up through the comp reimbursement to their comp carrier and future medical or future benefits or they're going to give it up if we decide that the hospital is entitled the excess.

MR. MCSWAIN: Well, ...

JUSTICE #3: It is hard for me to see see the plaintiffs can get

and went.

MR. MCSWAIN: In many, many cases-- first of all in many, many cases, there are no future benefits. If the future benefits are large to material and frankly we've got side of the cases in our brief, that comp carrier intervene in most cases and get a determination on those cases. There's a case that called Protection Purpose Compensation Insurance Fund versus Travis at the Court order of Court of Appeals that is 9127 plus 7895 that-at-full-yesterday that talks about how the carriers intervene and get its termination of what their future benefit and credit is going to be as a result of the recovery in any case. There isn't a windfall though were the plaintiffs are-- where the plaintiffs make a client for medical, which they have not paid for but which arguable they had occurred either trial or settle their case and get a recovery based on that medical and then they turn around and tell the hospital that was required to take the man for treatment to begin with. You don't get your credit for that.

JUSTICE #3: But ultimately is going to come out the comp. carrier's pocket. They're the ones who are going to pay.

MR. MCSWAIN: Not for that additional-- not for the additional ...

JUSTICE #3: It's that don't get the credit against future benefit.

MR. MCSWAIN: Yes, Ma'am.

JUSTICE #3: I mean presume with me that there're future benefits here -

MR. MCSWAIN: Okay.

JUSTICE #3: - for future medical -

MR. MCSWAIN: Okay.

JUSTICE #3: - because we don't know that, that presume there is and the hospital get its amount at the expense of the comp carrier but is now we got to know the future credit.

MR. MCSWAIN: That may or may not be their ...

JUSTICE #3: Evidence on the ...

MR. MCSWAIN: Depending on to-- how could that not be ...

JUSTICE #3: Presuming future benefit.

MR. MCSWAIN: - it de, it-- number 1, it depends on how the members worked out. Number 2, it depends on whether or not the comp carrier actually intervenes in the case which should if its, if its material at all the comp carrier ought to intervene in the case to determine what the numbers are and get a-- if we look at this Travis case, get a traditional determination of what, of what a credit it's going to receive out of purchase of a case as against this future benefit paid.

JUSTICE: What do you think recovering-- right to recover the hospital's right to recover should turn on one of those windfall to, to injured workers?

MR. MCSWAIN: What I believe Judge is that, what I believe Judge is that the-- is that this two statutes, the Comp Act and the, the, the provision of the Comp Act and the Hospital Lien Act ought to be read to get. There is a way to read this statutes together or all of those interest are accommodated.

JUSTICE #1: What do you think a matters that they presented at the Emergency Room as suppose to a compensation provision?

MR. MCSWAIN: Yes, I do believe that it makes a difference that they presented to the Emergency Room. A Hospital Lien Act applies primarily to emergent type of situations where the admission is, is placed or is made within 72 hours the accident that actually caused, the accident the actually caused the injury to begin with for the most part of emergent type situations.

JUSTICE #1: So you, so you think if in to those circumstances and

where the recovery was got to be ain't nothing due to medical the hospital would lend an additional but if that were not the case hospital matter?

MR. MCSWAIN: There is a, there is a way to read statutes together for the Court. If you look to 417.002 for Labor Code and 417.001 of the Labor Code, you can make an argument and you can originally read the statutes together that if the comp carrier intervenes that-- and establishes whatever its future, you know, whatever its future benefit credit is going to be, which is what we ought to do which is going to be substantial, then a hospital takes after that. You can read the statutes in order to do that. I do not believe that the comp carrier ought to have a material free-floating application after that is solute file and, and to litigate it in some place in some judicial bribery at judgment or in order of type because frankly that can serve the benefits of comp claimant. They don't know what their-- they don't necessarily know what their credit would be. It, it done sort of benefits of the comp carrier because they have established to what that is and it certainly then-- it certainly does not measure with the Hospital Lien Act and the protections that are given by the Hospital Lien Act for the hospital's total bill charges.

JUSTICE: Mr. McSwain, -

MR. MCSWAIN: Yes?

JUSTICE: - everything we know about the settlement with Jones, the third party tortfeasor is on the great statement facts, is that correct?

MR. MCSWAIN: I believe that, that's correct. Yes, your Honor.

JUSTICE: So is there anything in the-- in those fact statements that tell us what damages beside medical expenses were alleged by workers?

MR. MCSWAIN: To tell you the truth, I'm not sure whether not or there is. I believe that it is, I, I believe that it is a fair assumption that there was also plain language of [inaudible] ...

JUSTICE #1: So do we know whether the hospital's lien or its significant part of it settlement or not. How do we, how do we understand what the breakdown is?

MR. MCSWAIN: By the way, the numbers worked, with numbers worked, the hospital's lien interests that were unpaid by the comp carrier were something only over \$12, 000 which is less than 10 percent of the overall settlement, you know, somewhat more to take out the attorney's fees in medicated medic settlement but it's-- but you know, hospital lien were not significant portions of this, of this settlement proceeds.

JUSTICE: If we were to find your way, wouldn't that be a decent incentive for a hospital to seek payment under the Comp Act, I mean, the Comp Act counterplay's procedure by which the hospital can come in and, and if it done think it gets paid or not seek more payment.

MR. MCSWAIN: Yes Ma'am, that there is in the aim of this is pointed out that there is a right to appeal, you know, if we pointed out in our response. Some of those rate did not been-- some of hospital reimbursement rates did not been increased since 1997.

JUSTICE: But regardless it allows any amount around that procedure.

MR. MCSWAIN: And, and the exempt in the instance where the excess recovery is completely if not with future benefit claims. Those funds that the interrupt that, you know, the square-- the difference between the comp payment and what the actual charges are. With Comp Act of third party moneys, either insurance-- third party insurance moneys or

third party assets somehow. It didn't come out of the comp system. It didn't come out of a pocket claimant.

JUSTICE: But don't we have an exhaustion problem here? I mean, shouldn't have to get through that procedure first and determine the most that they can be compensated by Comp. or you even reach the question?

MR. MCSWAIN: Judge, I, I honestly do not believe, believe that point of case. I don't believe that the legislature impliedly cancelled that protection of Hospital Lien Act by the enactment. In 1989, the Sub-Court complication in 1993 of the Worker's Comp Act. The Comp Act does not say that the debt is extend. What the Comp Act says before 32.042 is that the, is that the hospital may not pursue the injured employee. It does not say that the hospital cannot pursue its Hospital Lien Act right against third party tortfeasor.

JUSTICE: Mr. McSwain, -

MR. MCSWAIN: Yes, your Honor.

JUSTICE: - I don't recall. Is there probation in the Comp Act apart from the Hospital Lien Statute that protects medical, medical providers in re, in regard to third party actions that the Comp Carrier and Medical Providers are not being protected on those?

MR. MCSWAIN: I'm not sure that I understand exactly what you're asking before 17.001 and before 17.002 basically said that Comp Carrier subrogate it to the rights of the injured employee standing in his shoes whether it-- with respect to the recovery of at least the past medical expenses and in my view on this Travis case, you know, ought to be at the future medical, future medical expenses and benefits maybe payable. That's all that I know about that one, that one.

JUSTICE: Is there a process by which the carrier in the act is your process by which the carrier plain set up to intervene? I-- can I go to commission; can I said, "Look can I bring settlement over you?"

MR. MCSWAIN: I'm not that-- not honestly don't know the technical answer to that question. I-- as a practical matter, if the benefits are going to be material-- as a part of a matter in any personal and pursuit where Worker's Comp Carriers involved. They have to be taking care of. Everybody knows that profit, you know, in the context of those cases.

JUSTICE: First, they have to be taking care of first?

MR. MCSWAIN: That's my belief, Judge. I, I think they have to be taking care of first.

JUSTICE: And then would the hospital come next?

MR. MCSWAIN: I believe the hospital would come next.

JUSTICE #1: And would disobey prorating interview with the claimant if the, the Comp Carrier First hospital Acts and then-want-to-rebut?

MR. MCSWAIN: I believe that's right that the Hospital Lien Act requires charges to be reasonable and necessary and as a matter of fact, in this case the-- and the plaintiffs should take got-a Court to prove their medical damages and they claim the total bill of charges. They have to prove that they are reasonable and necessary. So how can I claim this charges are reasonable and necessary recovered damages for and as certain at they trial the case and they recovered damages and the damages that are recovered for past medical are twice what the Comp Carrier expect? Just like in this case, can a plaintiffs then turn around and say the hospital shouldn't be paid for this reasonable and necessary, for this reasonable and necessary expenses that we have proven up in a Court beyond what the Comp Carrier pays particularly in the situation involving the emergent-care-like this one where entitled

of better like requires the hospital to take that patient in and treat them with no chance of, of, of, of this charge or any other resolution until that patient's status has been stabilized.

JUSTICE: Well, we would have to find what way that the comp rights are not very reasonable.

MR. MCSWAIN: No, Ma'am. I don't believe that you have to find a law.

JUSTICE #3: Why?

MR. MCSWAIN: The comp rights who said out and, and I'm not agreeing that they are but the comp rights are said up by statutes with legislative authority and in the room I can process from the-- then workers confirmation out of Texas form of insurance. The Hospital Lien Act lend, we believe, basically is an addition to, to worker's comp rights when knows-- when that recovery comes from a third party's hands with, you know, if you look at the Sharp the case that the Texas Supreme Court that deals with the Hospital Lien Act, it says that one of the--just of cases for the Hospital Lien Act which make sure that the hospital charges its cost. May I finish Ma'am briefly and ...

JUSTICE: That, that's briefly, Okay.

MR. MCSWAIN: Now, I forgot what I was going to say. The-- we believe that the Sharp says that the hospital is entitled to recover its cost and that one of the-- if you look at the sharp, it says one of the purposes is for the hosp-- of the Hospital Lien Act is in pursuit of that purpose to be paid fully in his charges. I don't believe that you do have to find that the, the comp rates or unreasonable in order to read to that, you know. Thank you.

JUSTICE: Thank you. The Court is now ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Mr. Derek Tod Gilliland represent argument for the respondent.

ORAL ARGUMENT OF DEREK TOD GILLILAND ON BEHALF OF THE RESPONDENT

MR. GILLILAND: Mr. Chief Justice, may it please the Court and honorable of opposing Counsel. I believe, your Honor, that the, the one thing I would like to clear out in the brief summary of the facts that, that Mr. McSwain gave to the Court it is simply the timing of the lien because you know, in a way I think it-- I think it's, it's just powerful to know that the plaintiffs, Mr. Linnstaedter and Bolen were treated in the Emergency Room in the beginning of January 1996. A hospital found lineage within few days of that treatment. Sometimes later, the hospital received payment the exact date is not in the agreed statement of facts who were on records that sometimes later, received payment for the-- from the worker's comp carrier for the services. The Lien state as they were in those liens that stated in the record show that the amount do-in-all is the full amount they were never adjust it. There's no evidence that they were ever adjusted to account of the fact that lead some kind of paid had been made and then when the settlement was paid back out of the settlement. Now, I'm here on the half of Mr. Linnstaedter and Bolen to ask this Court to affirm the Court of Appeals and affirm the Trial Court of the three primary reasons and the first as we've argued in our brief and as takes as mutual as argued in there in-his-family. There was no debt because of the Worker's Comp Statute on which this lien could be based in Texas

law requires to lend to have an underlying debt debt.

JUSTICE: Is Mr. McsWain made some compelling arguments about a possible windfall as situation where the claim must to be reasonable in Court he had try to compromise lien for lesser amount?

MR. GILLILAND: Well, I now have-- I have two issues with the "windfall" arguments. First of all, there's nothing in the record to address that the two shown that there is any "windfall" at all. The two determined the claims received any sort "windfall" requires the Court to assumed that the ...

JUSTICE: Well, they got more money than the hospital did -

MR. GILLILAND: They got more money than a hospital.

JUSTICE: - by loan-check.

MR. GILLILAND: That's true that they got more than a hospital did but there's nothing in the record to show the subrogation that had -

JUSTICE: I just want to had, -

MR. GILLILAND: - to be paid.

JUSTICE: - you know, our health policy here to Courts not that great. So if I go at the hospital and the hospital des-- and my-- our great health company decides Blue-Cross, it'll pay 50 percent of my hospital bills and Brister's campaign the rest that risk to recovers whoever injured may Brister get to keep the extra 50 percent and Brister keep to say, "Oh no, all I was billed was what my insurer agreed to pay. No, that's just all my insurer agreed to pay. Don't ask they'll have to pay the hospital the rest of my bill."

MR. GILLILAND: That, -

JUSTICE: Why is that different from worker's comp.?

MR. GILLILAND: - that depends on for two such--first of all, if you're injured on the job, you have a worker's comp. coverage you that for-- coverage you and you're be in this situation.

JUSTICE: It's hard to get injured by this job but you know, except on our ...

MR. GILLILAND: It-sound-this-actually-truth but if your Blue-Cross-Blue-Shield contract says that the hospitals agreed or accept that as payment in full and that's [inaudible] ...

JUSTICE: I agree, I agree. We got nothing here that says the hospital-- probably the hospital never agreed to charge because I mean, in this case wouldn't get here providence that anything in right before providence hospital agreed to lower rates.

MR. GILLILAND: Well, your Honor as far as the agreement goes, first of all, the Texas Administrator Code Section 4 of 28th book of the Texas Administrator Code check the rule 4210, says that by treating a patient or submitting a bill, you agreed to be bound by the worker's comp provisions. Addition alone, the Emergency Medical Treatment on Active Labor Act 42 USC 3095 -

JUSTICE: But they say ...

MR. GILLILAND: - only requires treatment to the point of stabilization so the hospital does not want to participate -

JUSTICE: But the workers ...

MR. GILLILAND: - stabilize a patient and transfer them.

JUSTICE: Let me get a word in that.

MR. GILLILAND: I'm sorry, your Honor.

JUSTICE: Worker's Comp Commission doesn't have authority to set hospital rights for hospitals in Texas, period. They have authority to set reimbursement range, right?

MR. GILLILAND: That is correct.

JUSTICE: So they, they can't say what hospitals can and can't charge. They can say only what hospitals can be reimbursed -

MR. GILLILAND: But the statute ...

JUSTICE: - and then a free economy anything else the hospital can't get by will is a free economy. You don't want it? You shouldn't go to the hospital, right?

MR. GILLILAND: Well, in the-- I agreed, your Honor, that if you, if you don't want medical care and you don't want to pay for government hospital. In this case, Mr. Bolen and Linnstaedter would've match-before-together-and have to go to the hospital but when they did they recovered by the Worker's Comp. System and they were, they're bills were all to be paid by the Worker's Comp. System. Does eliminating the debt providing the subrogation right that the Worker's Comp. Carrier has and protecting them for all their medical expenses because under the Worker's Comp. Statutes Section 413.021 requires that the employee's entire medical care regardless when it happened, if it's related to this injury, has to be paid for by the Worker's Comp. Carrier and that obligation by the carrier cannot be settled, cannot be eliminated. They are on the go essentially until the patient passes away -

JUSTICE: The ...

MR. GILLILAND: - all of medical care related.

JUSTICE: The claimants could have pay off a substantial with, I mean, impossible for the members to work out so that it would be very substantial and the laws before the impairment claim of the hospital that when unpaid be very substantial as well.

MR. GILLILAND: I, I agree with that.

JUSTICE: You have-- I think that makes sense. Is that too risky?

MR. GILLILAND: Well, it-- I think, first of all, that there are occasions under the law and under the nature of jury trials that somebody who's going to wild that "windfall." Now, we'll have to from time to time. I don't think that the record in this case is sufficient to support the conclusion that there was a "windfall" because there're two in things were missing from the Court's record but in that situation, I think under the Worker's Comp. Statute in a fact that it's an all in Comp. System gives a ho, hospital it's avenue to challenge whether to get paid the Worker's Comp. bill. I think that allows a hospital an avenue to be made whole, to be made to take good care of, to take good care of especially in line of fact that the Worker's Comp. Statute under the Section-- I believe that's 413.011 requires that the reimbursement rights be fair and reasonable and gives the hospital an avenue to challenge that is in any of the issue of the Worker's Comp. Carrier don't look for all of these future medical benefits and so we don't know if what today at trial might appear to be a "windfall" but in 20 years where the back injury, the knee injury, flares backed out requires additional surgeries, additional treatments and the Worker's Comp. Carrier possibly counts back on the hook and that might not be a "windfall" after all as one of the suppose is same proceeds of the juries. I just never know exactly what the future might hold that, that decision has to be made before it's run. In that case, I think that the worker ought to get the benefit of that "windfall" as the Worker's Comp. Statute that set up to protect the employees and employer but I do not agree that it is situation there's any evidence in the Court's record to justify the conclusion of their "windfall." There's one single medical bill and then a statement that the entire past and future medical expenses where client in the case additionally I think that Section 410.00.7.001 of the Labor Code is instructive in deciding whether or not the hospital should get any credit out of a merit recovered by employee. Section 417.002 deals with a situation of

the employees deals in the third party and I guess it's not the employee has to reimburse the Worker's Comp. Carrier; 417.001 entitled the Worker's Comp. carrier to bring a claim on employees by harsh should the employee decide not to do so; and 417 says that if the carrier does do so finds that Worker's Comp. claim, that it specifically tells us how any recoveries to be handled and says that first the carrier must reimburse itself in the subrogation interest paid the cost from that recovery and then floating Sub-section B2 pay the remainder of the amount recovered to the injured employee. There is no exception of provision made for payment of a hospital's additional charges.

JUSTICE: Of course, they don't have any. In Senate there out of pocket \$10, 000 for the-- they're not going to be file claim for medical expenses for \$20, 000, of course, they don't care about, they don't care-- they could care a less about the hospital.

MR. GILLILAND: Are they the Worker's Comp. Carrier?

JUSTICE: Yeah.

MR. GILLILAND: Well, what I'm saying, your Honor, those statute recognizes that the hospital ...

JUSTICE: I know but they not, you know, I mean, I'm troubled by-- suppose this case is gone to trial, we have granulated issues hereby Great-here-of County vs. Smith conception the. Granulate this, we have, we have specific finding by the jury of \$20, 000, which is the amount of the hospital bill but is not the amount of the Worker's Comp. Payment, which is only \$10, 000, so we know for a fact that judge must paid becomes final, we know for a fact wherein over \$20,000; \$10, 000 of it is Worker's Comp., \$10,000 is the spread of those hospital amount. Now, why plaintiff execute that?

MR. GILLILAND: The plaintiff execute that because the spread is taken into account in the Worker's Comp. System by the way of a credit against future benefits that may at some point they individualized ...

JUSTICE: Some said-- and it paid have no future benefits either there're a broken leg and there all matter. They just get a motorboat as well as their bills, right?

MR. GILLILAND: I have to concede, your Honor, in that situation is that never had any future that any future medical related to. They don't developed outright. Just don't really need with those-- just don't need some other medical at some point in the future, then they did get the benefit of that they did win goes so far as to say \$10, 000 damages of a windfall because considering the circumstances, ...

JUSTICE: Well, I, you know, -

MR. GILLILAND: - you know ...

JUSTICE: - but you know, but you know, but, but we're assuming that the jury gave everything that entitled to promote the language and everything else. They just get an extra load about it.

MR. GILLILAND: So in that case, I think there might be a "windfall" but I don't think it's unjust and I think the "windfall" when you take into account the provisions in the Labor Code that set up the Worker's Comp. System that the legislature has determined that we're going to protect the employee and in occasion that the employee might get a little extra benefit out of that but more often than not.

JUSTICE: Do you have-- how does it work the employee comes up a year later and is-- and now suffering injury that is related to this injury and he's going to need some additional care and treatment to whatever-- in makes a claim, I guess the compensation benefits and then there's the carriers say, "We'll know you have to exhaust that settlement which you've got life-chill, -

MR. GILLILAND: Then -

JUSTICE: - how does it work?"

MR. GILLILAND: - if, if the, the way that works, first of all, if I may just before answering the Court's question, Mr. McSwain said that whenever there's future credit that the Comp. Carrier should go to the Court and get a determination. There's nothing in the Comp. Code in the Labor Code, the one with regulations that require a judicial finding to affect that future credit and in my experience, the Comp. Carrier wants to know what the net settlement is the claimant and they take that and put into their file and and into their information for the future credit. Now, the future credit to why it is handled is filed out in title 28 Section 42.75 of the Texas Administrator Code and in that case it says specifically when an injured worker has received an excess for recovery, so he got more than the subrogation amount after attorney's fees. So there's a future credit then the carrier know the files of providers of the day of the judgment or three judgment in the amount of the excess ...

JUSTICE: Can you file a copy of the judgment or three judgment which would have been in settlement situation with the board that provide-- the providers require to continue submit, submitting report that required by the Comp. Statute in bills and services provided after the judgment day or sent to the injured worker and the injured worker pays us. How is it a bills were also sent to the carrier and when the carrier looks at the bills and it says okay.

JUSTICE: So -

MR. GILLILAND: The bills have nothing that ...

JUSTICE: - from that point on the, the provider knows that exact to claimant to pay.

MR. GILLILAND: Correct.

JUSTICE: And those claimant who pay the comp. rates or the hospital charges?

MR. GILLILAND: That is something I do not know the answer, your Honor.

JUSTICE: What if the settlement said, "The, the medical has been covered by comp.? No part of this payment is for any medical expenses is all for claimant's suffering." I mean that does it allow-- would've a third party settlement be able to allocate what it goes to?

MR. GILLILAND: I, I think that there is in the situation where a third party settlement try allocate that and, and I'm not entitled to ensure what you're asking but if there is a valid hospital lien because a lien presupposes an underlying debt. I believe that was in the Herman Hospital versus Martinez case that accused in the Court of Appeals that it said that it doesn't matter what the jury find it is for medical expenses if there's a valid lien then in recovery subject to that lien even that is all for claimant's suffering so I think if you have ...

JUSTICE: What case is that?

MR. GILLILAND: That's a Herman Hospital versus Martinez case. I believe that's actually cited in the petitioner's brief.

JUSTICE: You think the argument your brief that, that the health care providers by the hospital are required to this payment comp. system and that seems a fairly significant point of difference between the two because that forms the basis of your argument that they don't have to-- if they choose to, then they sort of agreed that this are rates that are going to compensated somewhere in the private context and ensure us carrier agreeing that they'll accept the rate set out insurance agreement. They disagree with that agreements.

MR. GILLILAND: They do and I, and I think our, our disagreements

stand from 42 USC Section 1395 the, the-- which is the Emergency Medical Treatment on active Labor Act and they requires a patient that presents to an Emergency Room to be treated by the hospital. Now, we agree with them to that extent but that statute only requires treatment to the point of stabilization. Meaning that if they get an employee and they get somebody in that's a worker's comp. or somebody who they don't want to treat for one reason or another they have to treat them to the point of stabilization but then they can be transferred to a hospital that will participate in the comp. system. There's been no evidence in this case that the-- actually either way to what extent the treatment went beyond stabilization. To up to the point there stabilization, I would agree that it is not volunteer that they haven't presented any evidence that this all included is simply stabilizing the patient and were remanded to, to obtain more evidence that would be now because as they'll exceed what was required for stabilization. Once they're stabilized though even under the Emergency Medical Treatment on active Labor Act, the, the patient can be transferred and, and quite frankly in order area to stay. We see a lot of that with [inaudible] hospitals I can't afford to participate and so that if, that if that their clients to treat people who transfer from the Scott-wider and treat people and transfer into another surrounding hospital. So beyond a point of stabilization, it's my contention that it was by agreement additionally the section title 28 protects us Administrator Code 42.10 says that by billing or treating at a covered worker that agree to by-together by the provisions of the Workers Compensation Act. On top of that, I think this is a-- that, that the difference between the, the other cases the door caves out of-- I think it was almost I, I forgotten and then in Parnell case out of the California with-a-comp. The hospital had agreed with the provider to provide covers and accept this payment in full. I don't think that's a balance statute from this situation because in those cases the agreement for allowing a hospital to collect more than the agreement really didn't affect anybody except the hospital and the patient.

JUSTICE: You begin by saying there were three points -

MR. GILLILAND: Well, the first point ...

JUSTICE #4: - the first step on the Lower Court covered one would-that,- would-that-be ...

MR. GILLILAND: Well, the, the, the first point and we jump around a lots how much, how much of the issue covered but the first point is that there was no debt, in fact of debt, there's no about lien. Secondly, when you read the lines of the, the Labor Code under the claimants of construction and the ideas of construction laid up at this Court in a Crown Life versus Casteel case, taking into consideration that the language of the Hospital Lien Statute and the, the objectives and intent behind that statute which is the Marshalli case in this Court and the orders and the Hermann, I think it was the Herman Hospital case all said that the purpose of a Hospital Lien Act is the-- give hospital for protection of non-paying patients. This, gentlemen, by being covered by comp. guaranteed paying patients with the hospital had a problem with the, the bill they have an avenue to address like, additionally, I think this case with more important than the ones with the hospital who agreed by contract because in this case allowing the hospital to collect more than what was provided by Worker's Comp. Statute that which by a statute is suppose to be a fair and reasonable right affects the patient, affects the hospital and affects the Worker's Comp. System and frustrates their goals of controlling medical concept bringing employers within the comp. system because there maybe

dollars that they goes to the hospital refuses the future credit that the deduction in the future credit has to be counted for in the Worker's Comp. Carriers' budgets and by increasing their budgets those increases the past or long past premium in which is the employer that now affects ...

JUSTICE: Mr. Gilliland, two things.

MR. GILLILAND: Yes, your Honor?

JUSTICE: All of the-- your position regard to the, the stabilization the time that the hospital act to treat the patient up to stabilization, should the hospital be able to recover that?

MR. GILLILAND: I think that the hospital should be able to recover that but in this case because of-- beyond canvassing nature of the Worker's Comp. System to allow it to operate effectively, the hospital should only be able to recover that through the Worker's Comp. System.

JUSTICE: Right. So what is your, what is your answer within that this a hospital limited unto your scenario to the worker's comp. Allowance even for the time of the those stabilization?

MR. GILLILAND: Yes, your Honor.

JUSTICE: And they don't have any right to go in another hospital lien to recover their full cost of-- for that short period of time?

MR. GILLILAND: I, I don't agree-- I, I don't believe that they should -

JUSTICE: Okay. Then we, -

MR. GILLILAND: - recover their full cost.

JUSTICE: - then, then was a difference-- then, then you're saying if they continue to trade after that they would agreed into the statute-- under the statute they agreed but up to that point they have not agreed. Let say ...

MR. GILLILAND: They not not agreed. You, you're correct, your Honor but I don't think that the agreement is the-- that should be the basis for the decision on whether or not that limited to what worker's comp.

JUSTICE: Okay. So then we take the agreement of statute out. You, you're now banning your como-- your position that they would agreed by treating this special?

MR. GILLILAND: Well, now, I don't think that the [inaudible] in position.

JUSTICE: Okay, well, then, then they haven't agreed that you're pruning and they have to take.

MR. GILLILAND: They have to take them to the points stabilization.

JUSTICE: Okay.

MR. GILLILAND: Great.

JUSTICE: So have-- but they haven't ...

MR. GILLILAND: They haven't presented any evidence, your, your Honor for this Court.

JUSTICE: Okay, not, not on this record, not on this record. I agree there might not be evidence on this record but if there were evidence dividing that out?

MR. GILLILAND: If there were evidence dividing -

JUSTICE: Conclusion, conclusion.

MR. GILLILAND: - if there were evidence dividing that out, I guess it get beyond of facts of this case and I really haven't given a substantial matter, matter after to that question but I think to allow the Worker's Comp. System to operate Legislator-- Legislature 1022 and then a Court's provision under the statute regulations if it's a worker's comp. patient. I think they have to abide by the Worker's Comp. Act to if it had a cross-patient or somebody who didn't like the

HMO contract then they might be able to do force, they're willing to ignore the bill under that contract.

JUSTICE: Okay. Can I ask one short of question?

JUSTICE: Yes, Judge Johnson.

JUSTICE: In regard to the mechanics who have the comp carrier gives credit for future medic and I think we would count on hit to missed on that, is there any provision under the Administrator Code limiting the carrier a \$175, 000? Let's presume that the evidence is this was all past medical that were talked about here. There's no, no testimony that call the future medical. No evidence that call the future medical time settle and then three years later, we come up with bad back or something that is traceable to the injury. Now, is there any probation or either way about whether the carrier can also get the entire \$175,000 if the person legibly-- none of those was allocated for future medical intercept?

MR. GILLILAND: The, the statute of the, of the audio record Sections 417.001 and 002 especially 002 say that the net benefit or net amount received by the injured patient is a credit against future benefits, future benefits that include medical or, or medic benefits so I don't think the statute does not make of the statute between whether its credit for medical or credit for payments or credit for other thing. It just the entire amount for the [inaudible] as a future medical.

JUSTICE: So a hundred and seventy five that's saved up for future medical even though it's not anticipate or allocated that can all be all set against the future medical.

MR. GILLILAND: That's correct.

JUSTICE: Did you understand it?

MR. GILLILAND: That's great and ...

JUSTICE: And you take it beyond the 175 for the comp carrier has to start of the payment?

MR. GILLILAND: Yes, thank you.

JUSTICE: Any further questions?

MR. GILLILAND: Thank you Judge.

REBUTTAL ARGUMENT OF ANDY MCSWAIN ON BEHALF OF PETITIONER

MR. MCSWAIN: I'd like to address the argument that since there's no debt, there be no lien that plunged which is part of the argument of the respondent have made. If you look at Section 4, 413.042, only back up, Counsel said to the Texas Administrator Code and said that this patient Worker's Comp. System the hospital-- Providence Hospital agreed to abide by the provisions of the Worker's Comp Act. The only provision of the Worker's Comp. Act that deals with this is 413.042. It does not say that the debt is extinct. What it does say is that a hospital cannot collect from the employee. When the legislator did that in 1989 and Comp. Act 1993, the McCollum case was already on the books and the McCollum case had been balanced said very clearly and then was continued to bargain articles otherwise, that regardless of the-- of the work, of the workers, I mean, regardless of the effect to the Worker's Comp. Act whether or not there was a comp. claim or not which was an issue in that case. The Hospital Lien Statute had to be satisfied even ...

JUSTICE: So if, so if you trite the case and the plane gets rather

than asking for them complete pack of bills just as the 20,000, just as for the 10,000, just the 10,000 the pack that was paid out by -

MR. MCSWAIN: Further if you ...

JUSTICE: - your rewards of 10,000 your position is a hospitals still gets 20.

MR. MCSWAIN: That's correct.

JUSTICE: But in the role-role that, that happen because the plaintiffs always ask for, you know, as much or why would they could reasonably get. I mean that-- that's in the role of ...

JUSTICE: But the hospitals don't do that.

MR. MCSWAIN: I'm sorry?

JUSTICE: Hospitals don't do that when they bill.

MR. MCSWAIN: You, you know, ...

JUSTICE: But, but my point is that your argument that turned out "windfall" because whether the plaintiffs get a "windfall" or shortfall the hospital-- your role is number one hospital gets paid.

MR. MCSWAIN: If it's, if it's a -

JUSTICE: That is [inaudible].

MR. MCSWAIN: - if it's a third party fund, my, my belief is, is that this Court opt to harmanize the statutes and the Hospital Lien Act opt to take hold and if there are third party funds to be applied to some ...

JUSTICE: Even if the jury says the reasonable bill for this hospital is 10,000, the hospital gets 20,000 anyway ...

MR. MCSWAIN: You know, what, I cannot honestly don't know the answer to that question because a Hospital Lien Act only allows reasonable and necessary charges so the hospital charges the \$30,000 and the jury says the reasonable and necessary charges were 10. I'm not sure what the result that they to take turn.

JUSTICE: So reasonable and necessary are different fair unreasonable and that's what I'm startling with is that Comp. Act presents these amounts are fair unreasonable and at the Lien Act only allows what's reasonable and necessary. Why they're not the same? Why it suppose to be fair -

MR. MCSWAIN: Well, ...

JUSTICE: - and reasonable -

MR. MCSWAIN: I, I ...

JUSTICE: - more if you get it from third party tortfeasor as suppose if you get an argument.

MR. MCSWAIN: I, I can tell you that the Court standard is going to be reasonable and necessary. I can tell you that the Court-- if the plaintiff is going to ask for all of those medical treatment occurred whether, whether that's a limited to and not be, be limited by what the comp. carrier say and I can tell you that the comp. carrier's rights to reimburse the rates in some instances the hospital did not increase since 1997 and I can assure you that when they were first, when they were first to subjected in rule-making in 1997 if one of "windfall" for the hospital's lien act and that of reasons of substantial existence so I can agree that, that as we stand here today that the government's view or that, you know, the reimbursement rights from 1997 of fair and reasonable compensation and ...

JUSTICE: Well, I understand but there's an avenue to contest that?

MR. MCSWAIN: There is an avenue to contest that.

JUSTICE: And it will require us to find as a matter of law that the Worker's Comp. Act rights are not fair rights? We have to presume that.

MR. MCSWAIN: For participation in the comp, for participation in

the comp said, "I don't believe and for the, for the rights that are read to be reimburse by the comp carrier." I do not believe that this Court has to find ...

JUSTICE: Complete your thought.

MR. MCSWAIN: I do not believe that this Court has find that the comp. rates are not fair and reasonable in order to also allow the operation of Hospital Lien Act.

JUSTICE: Any further questions? Thank you Counsel that concludes the argument and the Court will now take a brief recess.

COURT ATTENDANT #3: All rise.

2006 WL 5918095 (Tex.)