

**ORAL ARGUMENT - 4/17/96**  
**95-1209**  
**TRAVELERS INDEMNITY V. MAYFIELD**

YOUNG: May it please the court. There are 3 conceivable sources of authority for the respondent's order in this case that Travelers pay the real parties attorneys' fees on a monthly basis: Constitutional authority; statutory authority; and the inherent power of the courts.

The response to the mandamus petition to clients to join issue on the constitutional basis, if any, for the respondent \_\_\_\_\_. And so I don't propose to address that this morning except to answer any questions that the court may have. And I will address the other conceivable basis in order.

First with respect to any statutory basis. Gov't Code §24.016 authorizes appointment of counsel where a party is "too poor to employ counsel". And it was under that statute that Mr. Ragland was appointed. The pre-1879 version of that statute expressly declared that the services of appointed counsel were to be pro bono. And in 1879 in a recodification that provision was taken out of the statute. Now the plaintiff infers from that cite a discretion on the part of the trial court to determine the sources of compensation for appointed counsel. There are two problems with that approach. First, it is contrary to the rule long established by this court that attorneys fees may be shifted only pursuant to express statutory or rule based authorization, and may not be shifted by implication. And secondly, it is contrary to the express provisions of the worker's compensation act.

This court has reaffirmed in case after case that Texas follows the American rule, that attorney's fees are recoverable when provided by statute or contract. And furthermore, that shifting requires an express legislative direction and may not occur by implication. That was the holding of this court in First City Bank v. \_\_\_\_\_, the holding of this court in New Amsterdam Casualty case and in the Neeble v. Capitol National Bank case. Thus, a statute like 24.016 which is silent on the subject of attorney's fees cannot be read by implication to authorize shifting of those attorneys fees to the opposing litigant.

BAKER: If I understand the other part of the statute if the claimant recovers the benefits they're asking for they get the attorneys' fees at the end?

YOUNG: That is correct your honor.

BAKER: So the real point is there's no constitutional statutory or inherent power to require the defendant Travelers to pay the fees incidentally \_\_\_\_\_?

YOUNG: That is correct your honor. Moreover, even at the end of the case under the worker's compensation act, those fees are not added to the claimant's recovery. They are drawn from the claimant's recovery. The statute directs the carrier to issue two checks each week: one to the claimant for her portion of the benefits; and one to the attorney for whatever benefits the commission or court has approved, whatever attorney's fees.

BAKER: So you're position on the statute then is there is no authority whatsoever to require the other side to pay the attorney's fees over and above the recovery?

YOUNG: That's right in a worker's compensation case. There are other sources of potential compensation for appointed counsel under §24.016. For example where the cause of action involves statutory fee shifting, there's no reason that appointed counsel couldn't in an appropriate case take

advantage of that, gain at the end of the case where the case is amenable to a contingency fee arrangement, that perhaps might require approval of the trial court, but that certainly would be a permissible source of compensation. The TC has the option of appointing an attorney employed by a legal services agency, or has the option of asking counsel to take on the case pro bono. And finally if all goes expedience \_\_\_\_\_ and it is necessary for the court's proper functioning that a party have counsel, the court may or may not have inherent authority to require public funding of counsel \_\_\_\_\_. But in any event there is no authority for private funding based on statute. So in general and under the worker's compensation act and particular the respondent's order cannot be sustained on any statutory basis.

With respect to the inherent power doctrine, that is a doctrine of allocation of governmental power. And it requires the allocation to the judiciary of sufficient governmental power to enable the judiciary to carry out its core function of administering justice. It is not a doctrine which gives the court inherent power over private individuals and over the funds of those private individuals. And there is a reason behind that. The inherent power doctrine is born of necessity. To use the words of the late Justice Spears, it flows from the law of self preservation. So it may from time to time in the interest of self preservation and enabling the courts to carry out their core functions be necessary to compel public funding: for example of court reporter's salaries, or constable salaries, or what have you. But with public funding as an available alternative compelled private funding is never necessary. And being never necessary it is never part of the inherent power of the courts. Instead the proper role of the courts is to do as this court did in the school finance case, to declare the need, to require the legislative branch to supply the necessary funding, but to leave it to the legislative branch, which does have the power to compel private citizens to fund public needs through taxes and fees and so forth, to determine the appropriate funding mechanism.

And so in conclusion the respondent we believe enjoyed neither statutory nor inherent power based authority to require Travelers to pay Ms. Reed's attorney's fees on a monthly basis. And for that reason we believe that a conditional writ of mandamus should issue.

ABBOTT: Would you explain to me why it is that you couldn't have just gone ahead and paid the money and had this matter resolved on appeal as opposed to having it handled by mandamus? In other words why is this matter \_\_\_\_\_ mandamus?

YOUNG: We could have done that, and that would have provided us with partial relief, and that if we prevail we would get our money back. That would not have relieved us of the burden of funding our opponent's litigation, providing our opponent with a war chest with which to fight us.

ABBOTT: So that is the real harm?

YOUNG: That is the harm that is irremediable by appeal. It is part of the harm, the other part of the harm is having to pay the money and not getting it back, which is remediable by appeal. But there are both aspects of it here.

SPECTOR: Travelers nonsuited immediately right?

YOUNG: Travelers nonsuited immediately after the respondent's order that it was going to have to pay Ms. Reed's attorney's fees. And indeed before Mr. Ragland made any appearance on behalf of Ms. Reed.

CORNYN: If you're going to have to ultimately pay Ms. Reed's attorney's fees, why is it irreparable harm to have to pay them now rather than later?

YOUNG: Again, because of the timing issue. Because we are required not only to pay her a sum of money, but we are required to give her a sum of money which she can then use to fight us on an on-going continuous basis for the entirety of the litigation.

PHILLIPS: Is there anything in the court's order that said these payments would be offset against whatever amount...

YOUNG: The order is totally silent on that.

PHILLIPS: Can you fit this into any particular language of one of our previous cases on irreparable harm?

YOUNG: Your honor I think it falls under the prong of Walker v. Packer that deals with injury that cannot be remedied following an appeal. It's a little different from disclosure of privileged information that once it's out it can never be brought back in. But the idea that we have to bankroll to float, to finance Ms. Reed during the pendency of the litigation, once the litigation takes place we have bankrolled her whether she has to pay back that interest free loan or not. And that's the harm that can't be remedied by appeal.

CORNYN: I'm thinking of divorce litigation where the court has the statutory authority to award interim attorney's fees; how is that any different from the harm that you're alleging here?

YOUNG: I don't think it is except for the substantive fact that the court has much broader discretion and power to do that. I think that if you got to a case where there was a clear abuse of the TC's discretion, then that would satisfy the inadequate remedy by law aspect of it.

Certainly it's a little different in that we're ordered to pay each and every month as an attorney's fee award is approved for what your honor is talking about might be a one time thing or occur a couple of times during the proceedings. But I think the key difference there is there would much more seldom be a clear abuse of discretion that would meet the basic substantive test for mandamus relief.

BAKER: Another question then. If you pay the sums and then if the final judgment the claimant recover the benefits did you say that they are paid on some installment basis?

YOUNG: Under the respondent's order we pay month by month. Now if there were no order and the claimant recovered attorney's fees at the end of the case they would be taken out of each payment to the claimant.

BAKER: Her recovery?

YOUNG: That's correct.

BAKER: As I understood your comment they would be paid in 2 checks: one to her for her part; and one check to the attorney for his \_\_\_\_\_?

YOUNG: As each payment accrues. And the rare exceptions the current Act has abolished lump sums of payments.

BAKER: Since you would have paid the attorney's fees in advance under the TC's order isn't it possible that you could also be a third recipient of the check to repaying the attorney's fees that you got so that you are repaid and that your statement there is no way to recover it hasn't any support?

YOUNG: That is correct assuming that the claimant ultimately prevails.

BAKER: They say because you've nonsuited your claim that there is no way she's not going to prevail?

YOUNG: Well we're continuing to pay her weekly benefits. So she is going to prevail to that extent. But the question then becomes first of all the respondent has made no order authorizing that kind of an offset.

BAKER: We don't know whether he would or not, so we can't speculate on that. I guess the real issue is assume that there is abuse of discretion because there's no way to do it under any one of the three ways that you talk about we still have the problem of adequate remedy on appeal, or by that other thing that you can get your percentage or your fees back out of her recovery?

YOUNG: That gives us our money back just as we can get our money back from Mr. Ragland writing a check to us. But it doesn't relieve us from the temporal element of having to finance her litigation against.

BAKER: That's the only basis then for your argument that the harm is irreparable and can't be fixed otherwise?

YOUNG: Well we also have questions about the ultimate recoverability of the fee, not necessarily from Mr. Ragland but from the plaintiff herself. But we recognize this court's opinion in...

BAKER: Well I understand that. But I think there's a lot of cases that say that's not a consideration.

YOUNG: That's Lone Star v. Street, that's right.

CORNYN: Do you concede that Ms. Reed will ultimately be able to recover some attorney's fees given the posture of the case, that is you're continuing to pay her weekly benefits; you've nonsuited your claim; is she ultimately going to be able to recover some attorney's fees?

YOUNG: Well she is recovering weekly checks, which at the present time are not offset for any attorney's fees. So she's recovering her full weekly entitlement under the compensation act. How long that will continue is an open question because we've nonsuited our appeal. Eventually the worker's compensation commission will determine if she's reached maximum medical improvement. And if it finds her injury has been compensable then her disability benefits will start.

ABBOTT: And regardless of what happens she will never recover any attorney's fees from your side? You will never have to pay her attorney's fees?

YOUNG: That's correct. Any attorney's fees that she pays are by the comp act is supposed to come out of her recovery.

ABBOTT: If you have to pay for her attorney along the way and that has to be repaid to you down the road, then in essence would mean that she would wind up with nothing?

YOUNG: Well she was guaranteed 75% of her entitlement. The attorney's fees can come out only at the 25%. Yes, it would be our position that we are subrogated to Mr. Ragland to the extent that we pay his bill.

SPECTOR: Now that you've nonsuited does the order require you to continue to pay the attorney's fees?

YOUNG: It does, and the first order requiring payment of attorney's fees was issued after the nonsuit. The respondent has not issued any more orders requiring us to pay attorney's fees, perhaps in light of this mandamus action. But the first order requiring payment was after the nonsuit, and it was for services rendered at least in part after the nonsuit.

SPECTOR: Have you paid any attorney's fees?

YOUNG: We have not. We had agreed with Mr. Ragland to suspend the actual payment pending resolution of this mandamus action.

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RESPONDENT

RAGLAND: May it please the court. I think it's important to put the case back into perspective in that at the time Ms. Reed was sued by Travelers, she had in her possession a final order of the worker's compensation commission awarding her benefits which the record shows would have amounted to about \$17,000. And Travelers Indemnity sued her to vacate that award, asked that it be vacated, and all costs of court be assessed against Ms. Reed.

Now it's different I believe if it please the court than a situation where she received an award which she perceived to be inadequate or no award and appealed that herself trying to get the district court to award benefits. That's entirely different. She got the award. She was satisfied with the award, and Travelers was in court trying to take it away from her. And I think it is disingenuous to suggest that in that instance Ms. Reed ought to have an attorney that will receive 25% of her benefits that she's already entitled to, or not have an attorney and lose those benefits.

I attached as exhibits to my response copies of the paper discovery that was served on Ms. Reed as a pro se defendant.

BAKER: Is there any dispute by Travelers that there's statutory authority to appoint an attorney for her?

RAGLAND: Your honor you understand I wasn't there when the record was made. I read the same record you are. But it's in the record that a representative of the attorney told Judge Mayfield we are not contesting the appointment of an attorney, only the means and method of payment.

BAKER: So what is the basis that you say the TC had the discretion to order Travelers to pay interim fees on a monthly basis? Do you agree that there's none under the constitution or statute?

RAGLAND: The statute does not address that your honor.

BAKER: Is there any statute that \_\_\_\_\_?

RAGLAND: I do not know of any statute.

BAKER: So are we to inherent powers?

RAGLAND: Yes sir I believe so.

BAKER: What's the basis for the inherent power of the court to award...

RAGLAND: Well your honor if the doctrine of inherent power of the trial court is to have any meaning, it must mean that the trial judge has the authority to fashion a remedy when none is provided by the law.

BAKER: Your point then is that a core function is to fashion a remedy to meet a need whether there's authority for it or not?

RAGLAND: Well let me address it this way your honor. I believe that the DC has a duty and obligation to tend to the business of the court. And this court has adopted rules and amended rules quite frequently about docket control and management of the cases and management of the attorneys, and here is a district judge who is faced with the proposition that this pro se litigant, a 49 year old lady with a high school education who is seriously ill, and she's required under the law rulings of this court to abide by the rules of procedure just like a licensed attorney. And one slip and she's out the door. One slip and she's sanctioned. One slip and her case is dismissed.

PHILLIPS: But you don't contest the TC could have met that need by assigning her an attorney would that attorney be forced to wait for fees the same as an attorney she would have signed on herself would have been forced to wait?

RAGLAND: I would have to say I would consider that to be the irony of all ironies when the moving force behind the adoption of the present worker's compensation statute was to get the claimant's attorneys out of the picture. And I think it would be very ironic now to come back and say you're out of the picture fee wise, but you're going to come back in on an appointed fee ratio or basis and wait 6-9 months to get your pay - as meager as it may be.

PHILLIPS: If you're right about that purpose and the compact(?) has set out certain times when fees can be shared, and it's not here, doesn't the inherent power of the court run up against a fairly comprehensive statutory scheme?

RAGLAND: I don't believe so your honor. Because as I read the comp statute, it doesn't address nor doesn't appear that the legislature ever contemplated the situation that we have in this case where a pro se defendant who has prevailed through the administrative procedure and has benefits awarded to her then runs against the biggest worker's compensation carrier in the State of Texas, and files paper discussion, numerous request for admissions any one of which if it please the court failure to deny anyone of them would throw her out on her ears. I don't think that the legislature contemplated that. And I believe that the DC has the inherent power to fashion a remedy when there is none, it's not addressed in the comp statute, it's not addressed in the judgment code statute under which he had the authority to appoint.

PHILLIPS: Are Travelers' fears that it may extend this money and never get it back well founded?

RAGLAND: In a pure academic standpoint I think so your honor just like Ms. Reed's fear that she will be denied the benefits that are already awarded to her and she will never get them. That's well founded. Now if there is any equity in our system who can stand the loss better? Travelers or Ms. Reed?

PHILLIPS: Is there any guarantee that you're willing to give to the opposing counsel so they

won't have to worry that they might recover this money eventually through the normal statutory subrogation?

RAGLAND: Is that a one-on-one question? If you're asking me personally you know I agreed with them at their request. I think everybody ought to have their day in court. And I said I won't pursue the collection of the money - \$1700 - and I haven't reneged on that promise. I think they ought to have an opportunity to present their case here and have it heard. I think it's a unique situation.

PHILLIPS: Well I'm really kind of narrowing this to getting down to the irreparable injury question, and trying to narrow it down I guess just to...you know Lone Star really moots this point. I was just thinking about payment as a possible point trying to get that out of the way, the fear of money loss, and just get down to the point of \_\_\_\_\_ the \_\_\_\_\_ as to finance your opponent's litigation would constitute an irreparable injury under Texas law?

RAGLAND: I think it would require a management decision back before the suit or the appeal that's filed your honor to whether or not they really think they have an opportunity, if they have a legitimate case to set aside this award, or is the litigation under these circumstances merely a club to beat Ms. Reed and similarly situated plaintiffs who have successfully appealed through the administrative procedure. They need to make that decision. If they think they really have a basis for it, then they ought to go ahead and file their suit.

PHILLIPS: Did Ms. Reed file her claim before you were retained?

RAGLAND: Long before. I think it will show up in the record, but I estimate it was 1 year to 15 months.

PHILLIPS: What kind of help did she have on that?

RAGLAND: It appears that she probably got some Baylor law student to help her, but I can't verify that. I don't know. It's not in the record, and I haven't asked her about it. Some of it is apparently some lawyer language - some of the pleadings that she made. But it was crude at best. Something that I might have done the first year I practiced law.

HECHT: Would you view the court's inherent power to authorize this same procedure anytime there's a pro se litigant?

RAGLAND: No.

HECHT: Why not?

RAGLAND: Because in the context of this case your honor he's got to consider the facts and circumstances that's presented to him at that time. Number 1, pro se who didn't institute the lawsuit, pro se defendant; and the nature of the litigation. No, I wouldn't say that it should be done. I said the court had the power to do it.

PHILLIPS: So she brought the first appeal and Travelers merely cross-claimed?

RAGLAND: No, the other way around your honor.

PHILLIPS: No I said if. If that, it might be a different result?

RAGLAND: I think it would be entirely different. Because then I believe the contingent fee arrangement, a provision in the comp statute, would be more applicable. Because as I understand that contingent fee statute, it says that the attorney can receive 25% of the amount recovered. Actually it's an hourly rate, a reasonable fee not to exceed 25%. But under the present posture of this case I don't see that Ms. Reed can be tagged with recovering anything because she already has it. She's defending what she already has.

SPECTOR: Would the TC if it determined that the appeal by Travelers was frivolous would they be able to sanction Travelers by ordering this payment?

RAGLAND: Well your honor I believe so. I mean if Rule 13 applies to insurance companies like it does to everybody else, I believe that they could be sanctioned for attorney's fees, or court costs, or whatever the judge felt was reasonable under the circumstances.

SPECTOR: That was not the basis for the court's order here?

RAGLAND: No ma'am. I don't find anything in the record that refers to Rule 13 tax sanctions. I sure don't. But by the same token if Ms. Reed could be sanctioned and she's there as a pro se defendant, she could be sanctioned for discovery delay, or not showing up for a hearing, or any number of things. I don't think Judge Mayfield would sanction either one of them unless it was just really a blatant violation of the rules his nature being what it is. But the rules apply to each of them equally.

PHILLIPS: So Travelers could have had the best claim in the world and you still think the trial judge...in other words whether the trial judge has this inherent authority, in this situation does not depend on the merits of Travelers' position?

RAGLAND: I don't think the inherent authority does your honor.

PHILLIPS: The comp board and the appeals could have just gone absolutely haywire and Travelers could have a great claim that if anybody looking at it on the merits would say they are going to prevail, and they still might have to advance the \_\_\_\_\_?

RAGLAND: I think the discussion has strayed from the point that I intended to make it. Maybe I didn't make it earlier on is this trial judge has the responsibility also to keep his docket moving and to make his courtroom available to other litigants just other than this one. And perhaps some of you have had the experience of sitting as a trial judge with pro se litigants. And even the smartest ones can cause a trial judge untold misery.

HECHT: Well that's why I asked you. I understood that to be your argument, and that's why I asked you: Didn't your rule apply to all pro se litigants? And that's true anytime you have a pro se litigant - plaintiff or defendant, or intervenor.

RAGLAND: That's true. And the relator Travelers in the record their attorney pointed out to the trial judge: Yes, we'd rather that she have an attorney. It's beneficial to us to have an attorney. They even recognized...

BAKER: They can agree that she can have attorney, but still not agree that they have to pay \_\_\_\_\_ her attorney?

RAGLAND: That's true. But Judge Mayfield was faced with this real problem: a lady who apparently needed some legal help. A complex case. Everybody admits the medical situation in this case.

I've been practicing law 31 years and most of it's been in the field of worker's compensation or personal injury, and I have never heard of this condition in 31 years. And I read the medical reports and I don't understand it. It's very complex and complicated. And to suggest that a lay person could possibly present that in any fashion or form that would be understandable to a judge or a jury is not realistic.

BAKER: When Travelers filed the appeal did that set aside the commission's order for the \$17,000 benefit recovery?

RAGLAND: Your honor I am going to have to plead ignorance on the effect of that. Under the old law it automatically vacated it. I do not believe that it does. But I can't be sure of that.

BAKER: In other words she's in court as a defendant with a viable \$17,000 award that they have to set aside; it's their burden?

RAGLAND: That's true.

BAKER: But she filed cross-claims to what?

RAGLAND: I think the pleadings says she filed a cross-claim for 401 weeks compensation.

BAKER: Is that total and permanent?

RAGLAND: Under the old law that would be called total and permanent. That's the maximum benefits that are available under this law too.

BAKER: That's a different amount than the \$17,000?

RAGLAND: I quite frankly don't know. I don't practice under the new comp act. There's no place for me in the new comp act. So what I know about it I've learned accidentally or incidentally since this came up.

CORNYN: Mr. Young said the only sources of authority for this order would be either constitutional, statutory, or within the court's inherent power. In Travelers' brief they note that in Ms. Reed's amended motion for an appointment of an attorney the allegation was made that if there weren't some provision that her position was that if there was not some way the trial court couldn't order the payment of your attorney's fees that the workers compensation act would be unconstitutional insofar as it applies to Ms. Reed. Is that still your position?

RAGLAND: Well that wasn't my position then. That was somebody else's. That was Ms. Reed's position. And I haven't addressed that there because I don't think that the constitutional question is reached. It's solely an abuse of discretion under the mandamus law. Whether or not he abused his discretion. I think it's even narrowed down to abuse of discretion in the means and manner of ordering the payment.

CORNYN: If we were to hold as Mr. Young argues that there is no inherent power in the trial court to order attorneys fee here, does Ms. Reed or do you on her behalf take the position that we have to decide a constitutional..

RAGLAND: Not in this proceeding your honor, and I think that it would be a disservice to the bench and bar if it were done on a record developed by a pro se defendant. I really do. There is much more that needs to be investigated, presented to this court and it ought to go up in the normal appellate

procedure, let the trial court rule on it specifically to make findings of facts and conclusions of law, take it to the court of appeals and give them a shot at it and then ultimately let this court in the regular appellate procedure. I think it would be a disservice to the bench and bar to make a constitutional determination on the record that was prepared by a pro se litigant.

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REBUTTAL

YOUNG: Justice Baker to answer a couple of your questions, the filing of Traveler's appeal did not vacate the compensation commissions' order, and Travelers continued and to this day continues to pay Ms. Reed temporary income benefits.

BAKER: Is that the same amount as the \$17,000?

YOUNG: I don't know where they get the \$17,000. I think that's an aggregate of all of the benefits that she would be entitled to under the current order. I am still not sure how that's computed because the date of her maximum medical improvement has not yet been ascertained. Her counterclaim for 401 weeks benefit would have greatly exceeded \$17,000. I'm not sure what the exact amount is.

A couple of very brief points. A defense counsel like a plaintiff's counsel is worthy of his hire. And we believe under the compensation act could be awarded a fee for defending benefits given by the commission or the appeals panel just as he could be awarded a fee for obtaining benefits that those bodies had denied. So we believe from each weekly check that Ms. Reed is now receiving, Mr. Ragland could obtain a court order entitling him to up to 25% of that weekly check. That would be a source of his fee on an on-going basis. Secondly, with respect to the suggestion that Traveler's filed this appeal as a leverage device rather than in pursuit of bona fide issues, I would point out to the court that there are both legal and factual issues that were involved in Travelers appeal that made it well worthy of being filed. The question of whether aggravation of a preexisting non-injury condition is a compensable event is a matter that is unsettled in the courts, and whether Ms. Reed in the particular circumstance of her medical condition qualifies under that standard is a factual issue that was worthy of considerable discussion.

BAKER: \_\_\_\_\_ to make that appeal disappear when you had to pay attorney's fees \_\_\_\_\_?

YOUNG: The balance of benefit verses risk changed when we had to pay attorney's fees and we made the decision that if we were going to have to pay 2 sets of attorney's fees going forward that it was not worth pursuing.

Justice Spector yes the court would have power to sanction Travelers like any other litigant for filing frivolous lawsuit, and the court has not done that and we don't believe that would be an appropriate circumstance here. The court also had other avenues available to it to protect Ms. Reed in the event that it viewed Traveler's as overreaching. First of all the court has power over discovery and could regulate what discovery could or could not be submitted to Ms. Reed as a pro se litigant. It also had the power under the statute to appoint counsel for her. And we do not contest the appointment of counsel. The question then becomes did the court have authority to order Traveler's to pay that counsel under the inherent power of the courts? We say no, that if that was absolutely necessary for the court's functioning to appoint her an attorney, a matter which the El Paso court has said that probably is not within the inherent power, but even if it is, the inherent power extends to compelling public funding of that which is necessary for the court system not to constricting(?) private funding. Particularly, in light of the statutory policy of the act, which is that attorney's fees for claimants are to be drawn from recoveries, recoveries are to be net of attorney's fees rather than gross with attorney's fees added on. And the obvious purpose of that as with

the entire 1991 Act was to reduce the transaction costs that were perceived as over-burdening the worker's compensation system. If Travelers is ordered to pay Ms. Reed's attorney's fees obviously that is a cost that ultimately must be passed on to policy holders in the form of premiums, and that just takes us back to the pre-1991 circumstances that led to the passage of the new act.

PHILLIPS: Can you tell me very briefly how we can say that this is an abuse of discretion for which there is no remedy by appeal - it's effective, and at the same time polled our Canadian helicopter standard that there may be a special appearance that's wrongly ruled upon but in an ordinary case you have to go through a trial and is that by appeal? Or even a summary judgment which you are clearly entitled to but it was denied and you have to try the case and pursue that \$5 million?

YOUNG: One's own litigation expenses are held in Walker v. Packer and numerous other cases not to constitute the kind of irreparable injury that the courts will take cognizance of. I am not aware of any case that extends that to funding not only one's own litigation expenses, but one's opponent's litigation expenses as not constituting irreparable injury. That I think is the distinction. I think the abuse of discretion here is clear in the sense that there is no authority, no discretion really to be abused. And so then you focus on the inadequacy of the remedy at law and what distinguishes this case from a summary judgment or a special appearance is that not only are you forced to go through the delay and expense of the trial, which is what every litigant is forced to go through, but you are forced to on an interim basis - not at the end of the case when you lose, but on an interim basis fund your opponent's litigation against you.

SPECTOR: Of course you are also required to pay her other payments while the trial is...and it may turn out that she's not entitled to any of those?

YOUNG: We have to take that because that's the way it's given to us in the worker's compensation act.